In the Supreme Court

Appeal from the Court of Appeals
Whitbeck, P.J., and Holbrook, Jr., and Zahra, JJ.

SANDRA GAIL FULTZ and OTTO FULTZ,
Plaintiffs-Appellees,

v. **Docket No. 121613**

UNION COMMERCE ASSOCIATES LIMITED PARTNERSHIP, COMM-CO EQUITIES, NAMER JONNA, ARKAN JONNA, LAITH JONNA, MOSHIN KOUZA, GLADYS KOUZA,
Defendants,

and

CREATIVE MAINTENANCE, LTD.,
Defendant-Appellant.

BRIEF ON APPEAL OF DEFENDANT-APPELLANT CREATIVE MAINTENANCE, LTD.

*** ORAL ARGUMENT REQUESTED***

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STATEMENT OF JURISDICTION

This Court's jurisdiction is grounded in MCR 7.301(A)(2), review, by leave granted, after decision by the Court of Appeals. Leave was granted by order dated April 8, 2003.

Defendant Creative Maintenance, Ltd. appeals from the March 19, 2002 Opinion of the Michigan Court of Appeals ***(Apx 46a)*** together with its May 2, 2002 order denying rehearing. The Court of Appeals affirmed the Oakland County Circuit Court's August 29, 1999 judgment ***(Apx 40a)*** entered after the jury rendered a verdict against Creative Maintenance, Ltd. and other defendants.

STATEMENT OF QUESTIONS PRESENTED

I. Non-possessor who breached no contract:

Creative Maintenance's only relationship to the parking lot where plaintiff fell is a contractual one to plow with 1½ - 2 inches snowfall and apply salt if necessary. Its duties are grounded, not in possession or control of the lot, but *only* in contract. The jury found no breach of contract. Is this injured third party's negligence claim legally viable?

The trial court answered the question, "Yes."

The Court of Appeals answered the question, "Yes."

Plaintiff/Appellee contends that the answer is, "Yes."

Defendant/Appellant Creative Maintenance, Ltd. submits that the correct answer is, "No."

II. Negligent performance of contract: the misfeasance/nonfeasance distinction:

Suit in tort for injuries allegedly arising out of negligent performance of a contract cannot be maintained absent proof of *mis*feasance. *Rinaldo's Construction v Michigan Bell*, 454 Mich 65 (1997). Plaintiff complains that Creative Maintenance negligently failed to salt Farmer Jack's parking lot close enough in time to her fall to remedy icy conditions. Did plaintiff's cause of action fail as a matter of law because only non-actionable *non*feasance was arguably demonstrated?

The trial court answered the question, "No."

The Court of Appeals answered the question, "No."

Plaintiff/Appellee contends that the answer is, "No."

Defendant/Appellant Creative Maintenance, Ltd. submits that the correct answer is, "Yes."

III. Open and Obvious Danger Doctrine:

The open and obvious danger doctrine dictates that there is generally no duty to warn or protect invitees from known or obvious hazards. Should this doctrine be available to a snow-removal contractor, who neither possesses nor owns the premises, but whose liability arises solely from its alleged failure to remedy snow and ice accumulation on the premises?

The trial court answered the question, "No" and denied Creative Maintenance's motion for directed verdict, its motion for judgment notwithstanding the verdict, and its request for an open and obvious danger jury instruction.

The Court of Appeals answered the question, "No."

Plaintiff/Appellee contends that the answer is, "No."

Defendant/Appellant Creative Maintenance, Ltd. submits that the correct answer is, "Yes."

IV. Comparative Negligence Jury Instruction:

> MCR 2.516(D)(2) provides that trial courts "must" give requested standard jury instructions if they apply and accurately state the law. This is a slip-and-fall case where plaintiff testified that she was warned about icy conditions and saw the icy conditions herself, but elected to walk over the ice while carrying four bags of groceries, a jug of milk, and her purse. Was defendant entitled to have the trial judge give the standard jury instruction on comparative negligence?

The trial court answered the question, "No."

The Court of Appeals answered the question, "No."

Plaintiff/Appellee contends that the answer is, "No."

Defendant/Appellant Creative Maintenance, Ltd. submits that the correct answer is, "Yes."

STATEMENT OF FACTS

A. Case Overview.

This is a slip-and-fall suit alleging that the owners of a shopping center, and a snow-removal contractor, Creative Maintenance, Ltd., negligently allowed ice to accumulate in the parking lot where plaintiff slipped. The case was tried before an Oakland County jury, which returned a verdict against all defendants. Although the jury found that Creative Maintenance did *not* breach its snow-removal contract with the property owners, it nevertheless found that Creative Maintenance was negligent.

Creative Maintenance appealed, arguing that it could not be held liable to plaintiff where the jury specifically found that it had fulfilled its contractual obligations concerning snow removal and salting and arguing that contract obligations only create independent tort actions where misfeasance is shown. Creative Maintenance also argued that the open and obvious danger doctrine negated any purported duty, and that the jury should have at least been instructed on the open and obvious danger doctrine, as well as on comparative negligence.

The Court of Appeals affirmed, holding that Creative Maintenance owed plaintiff a duty, that the open and obvious danger doctrine could not be invoked by Creative Maintenance because it was "not the premises owner," and that the trial court correctly refused to read the standard jury instruction on comparative negligence.

B. The Slip and Fall.

Plaintiff's slip-and-fall accident occurred when she worked at the Farmer Jack grocery store on Union Lake Road in Commerce Township. On December 7, 1994, plaintiff arrived for work at about 4 p.m., parking her car well away from the store to leave closer parking spaces

for customers.[1] As she walked towards the store she noticed that the parking lot was "all slush."[2]

Plaintiff testified that the parking lot's condition "concerned" her while she was inside working, so during one of her breaks she looked outside and noticed that the slush appeared to have frozen.[3] And at about 7:30 p.m., one of plaintiff's coworkers, Kim Coon, told plaintiff that the parking lot had gotten icy.[4]

Plaintiff's coworker Sue McCabe testified that she observed patchy ice in the parking lot that night.[5] McCabe recalled that the ice was bumpy, and that there were spots without ice.[6] She did not recall the lot being covered with a sheet of ice.[7]

Plaintiff and coworker Kim Coon both got off work at about 10:00 p.m. Both had done grocery shopping during breaks, and needed to load their cars with groceries. Ms. Coon testified that when she tried to push her grocery cart across the parking lot she could not get her cart to move because the ice was "too hard."[8] Therefore, she took her groceries back into the store and "walked out to my car and brought my car up and pulled it up to the front."[9] Although Ms. Coon claimed that there was a solid sheet of ice, when asked if she had any trouble walking out to her car she testified, "No. Myself, no."[10]

When plaintiff left the Farmer Jack store she was carrying four grocery bags containing 20-25 pounds of groceries (2 bags in each hand), as well as a gallon of milk and her purse.[11]

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[1] Apx 84a, S. Fultz, p 8.
[2] *Id.*
[3] Apx 84b, S. Fultz, p 10
[4] Apx 98a, S. Fultz, p 35.
[5] Apx 75a, McCabe, p 75.
[6] Apx 68a-69a, McCabe, pp 62-63.
[7] *Id.*
[8] Apx 79a, Coon, p 165.
[9] *Id.*
[10] Apx 79a-80a, Coon, pp 166-167.
[11] Apx 87a, 99a, 119a, S. Fultz, pp 13, 37, 78.

She left her grocery cart at the door because she had been told that she couldn't get a cart across the parking lot.[12]

When plaintiff looked out at the parking lot she saw "ridges of frozen slush."[13] She described the ice as "very bumpy," which she attributed to pedestrian traffic and cars driving through it.[14]

Plaintiff noticed that Ms. Coon had pulled her car up to the sidewalk near the front entrance and was loading groceries into her car.[15] This was not Ms. Coon's usual practice.[16] Plaintiff acknowledged that she likewise could have left her groceries in the store and pulled her car up to the salted walk area to load her groceries.[17] But she did not.

Plaintiff also acknowledged that after she stepped off the salted sidewalk and confronted ice in the parking lot, she could have stepped back up to the safety of the salted sidewalk.[18] But she reasoned that she had "already started across" the parking lot, so she kept on walking.[19] Plaintiff elected to walk directly from the store entrance to her car in a straight line.[20] She did not try any alternate routes. Although plaintiff knew that there was a sidewalk partially covered by a canopy along the Farmer Jack store, and that this presented a possible different course of travel, plaintiff did not take it because she didn't think that the sidewalk was as well lit as the parking lot.[21] She testified that the lighting in the parking lot itself was "fine."[22]

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[12] Apx 86a, S. Fultz, p 11.
[13] *Id,* p 12.
[14] Apx 114a, S. Fultz, p 68.
[15] Apx 88a, 98a, 99a, S. Fultz, pp 15, 35, 37.
[16] Apx 116a, S. Fultz, p 71.
[17] Apx 125a, S. Fultz, pp 89-90.
[18] Apx 116a, S. Fultz, p 72.
[19] Apx 99a, S. Fultz, p 37.
[20] Apx 88a, S. Fultz, p 15.
[21] Apx 125a, S. Fultz, p 90.
[22] Apx 87a, S. Fultz, p 14.

After walking about 60 feet to her car,[23] plaintiff stepped "over one of the ridges of ice and my -- one of my feet slipped."[24] Plaintiff summoned help and a number of Farmer Jack employees walked out to assist her.

C. The Snow-Removal Oral Contract.

At the time of plaintiff's slip-and-fall, Creative Maintenance, Ltd., a snow-removal and landscaping company, was under contract with the owners of the shopping center to provide snow-removal services. David Sherman, Creative Maintenance's Vice President, testified that he and other Creative Maintenance employees plowed the shopping center parking lot early in the morning on the day of the accident.[25] Creative Maintenance had five employees, and also used subcontractors such as Jeff Druin (who lived across the street from the shopping center) and Ed Pillow.[26] Mr. Sherman recalled that it was probably Ed Pillow, Jeff Druin, and the "sidewalk" person, Jim Lindsay, who worked with him at the shopping center that morning.[27]

Creative Maintenance began plowing the parking lot at about 4 a.m. on December 7th.[28] With two trucks, it typically takes Creative Maintenance four hours to plow that lot.[29] Mr. Sherman recalled that they plowed there "all morning."[30] Although snow continued to fall while they were plowing, the lot was plowed when they left.[31] Because Creative Maintenance's plow blades do not have the typical "shoes," the plows were able to scrape down to the cement.[32]

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[23] Apx 222a, O. Fultz, p 95.
[24] Apx 88a, S. Fultz, p 15.
[25] Apx 163a-164a, Tr Vol III, Sherman, pp 166-168.
[26] Apx 157a, Tr Vol III, Sherman, p 153; Apx 185a, Tr Vol IV, Sherman, pp 9-10.
[27] Apx 188a, 191a, Tr Vol IV, Sherman, pp 15, 22.
[28] Apx 163a-164a, Tr Vol III, Sherman, pp 166-168.
[29] Apx 165a, Tr Vol III, Sherman, p 170.
[30] Apx 168a; Tr Vol III, Sherman, p 176.
[31] Apx 167a, 168a, Tr Vol III, Sherman, pp 173, 175.
[32] Apx 171a, Tr Vol III, Sherman, p 181.

In addition to plowing the snow, Creative Maintenance salted the shopping center sidewalks and entrance area.[33] It did not salt the parking lot.[34] Mr. Sherman evaluated the need to salt the parking lot that morning. He testified that salt is ideally applied at 4 a.m. when the lot is almost empty, so that shoppers and cars will not be pelted with rock salt.[35] Mr. Sherman used his discretion, and determined that because the temperatures had been in the fifties during the previous week, any residual snow would melt and flow down the drains due to the heat retained by the black asphalt surface.[36]

No one called Mr. Sherman on December 7th to report any adverse conditions in the parking lot.[37] As part of his standard routine, Mr. Sherman returned to the shopping center between 6-9 p.m. on his way home.[38] He noticed a minor accumulation of snow, but observed no condition that called for an application of salt.[39]

The contract between Creative Maintenance and the shopping center owner was an oral contract. The agreement was that Creative Maintenance would provide snow-removal service, after accumulations of one-and-a half to two inches of snow, and would salt when needed.[40] Creative Maintenance billed the property owners for each service.[41] The plowing and salting services were left to Creative Maintenance's discretion, and the contract did not require Creative Maintenance to salt after each plowing.[42]

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[33] Apx 169a-170a, Tr Vol III, Sherman, pp 178-179.
[34] *Id.*
[35] Apx 201a, Tr Vol IV, Sherman, pp 41-42.
[36] Apx 197a, Tr Vol IV, Sherman pp 33-34; Apx 178a, Tr Vol III, Sherman, p 196.
[37] Apx 177a, Tr Vol III, Sherman, p 193.
[38] Apx 179a, Tr Vol III, Sherman, p 197.
[39] Apx 180a, Tr Vol III, Sherman, p 199; Apx 216a, Tr Vol IV, Sherman, p 71.
[40] Apx 183a, 215a, Tr Vol IV, Sherman pp 6, 70.
[41] Apx 193a-194a, Tr Vol IV, Sherman, pp 25-28.
[42] Apx 174a, Tr Vol III, Sherman, p 187.

From the parking lot owners' perspective, Creative Maintenance was "expected to go out and plow and salt to make it safe, to clear it out, whatever needs to be done."[43] This arrangement had worked successfully since the shopping center's opening about eight years earlier.[44] Tenants were encouraged to call regarding any maintenance issues, and the property owners received no complaints about the parking lot on the day of plaintiff's fall.[45]

D. Procedural History

1. Plaintiff's Claims.

Plaintiff sued the owners of the shopping center and Creative Maintenance. In her first count, plaintiff did not seem to distinguish between the defendant property owners and Creative Maintenance, alleging that "defendants" owed plaintiff a duty to maintain the premises in a safe condition, and to exercise reasonable care to diminish any hazardous snow, ice, or slush accumulation.[46] Plaintiff alleged that the defendants breached those duties by negligently allowing dangerous snow, ice, or slush to accumulate in the parking lot.[47]

In her second count, plaintiff alleged that she was a third-party beneficiary of the snow-removal contract between Creative Maintenance and the property owners, and that she was entitled to recovery because Creative Maintenance breached its contractual duty to remove snow and ice from the parking lot.[48]

Finally, plaintiff's husband asserted a loss of consortium claim.[49]

After Creative Maintenance was named as a defendant, within plaintiff's Second Amended Complaint, Comm-Co filed a cross-claim seeking to shift its responsibility for

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[43] Apx 136a, Jonna, p 112.
[44] Apx 135a-136a, Jonna, pp 110-111.
[45] Apx 148a-149a, Jonna, pp 136-137.
[46] Apx 5a, Second Amended Complaint, at ¶¶ 13-14.
[47] Apx 6a, Second Amended Complaint, at ¶17.
[48] Apx 8a, Second Amended Complaint, at ¶¶24-26.
[49] Apx 9a, Second Amended Complaint, Count III.

damages to Creative Maintenance. It sought recovery of any, or alternatively part, of the damages it might owe plaintiff. Comm-Co claimed that, if plaintiff's allegations were true, Creative Maintenance would have breached its contract by failing to perform it in a workmanlike manner.[50] Comm-Co sought recovery based on implied contractual indemnification and contribution.[51]

2. The Trial.

The case was tried before Oakland County Circuit Court Judge Fred M. Mester. After plaintiff rested, Creative Maintenance and the property owners moved for a directed verdict.[52] The property owners argued, among other things, that plaintiff's testimony showed that she had actual knowledge of the icy condition in the parking lot yet voluntarily encountered them anyway, and that her claim was therefore barred by the open and obvious danger doctrine.[53] Counsel for Creative Maintenance joined in the argument made by counsel for the property owners, and added an additional argument that plaintiff had failed to present any evidence concerning the standard of care for snow-removal contractors.[54]

Plaintiff's counsel responded that because the defendant property owners had been defaulted earlier in the case, and were involved in the trial only on the issue of damages, their motion for directed verdict was precluded.[55] He also argued that the open and obvious danger doctrine did not apply because plaintiff had no alternative but to walk across the parking lot to get to her car.[56] He also argued that Creative Maintenance had a contractual duty to plow and salt that was breached because "[t]here was no salt at all that day."[57]

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[50] Apx 25a, Comm-Co Cross-Claim, ¶¶7-9.
[51] Apx 25a, Comm-Co Cross-Claim, ¶¶ 9-10.
[52] Apx 225a-231a.
[53] Apx 225a-226a.
[54] Apx 226a-227a.
[55] Apx 227a.
[56] *Id.*
[57] Apx 228a.

Judge Mester thought directed verdict was "a close question," but because a trial judge is compelled to view the evidence in the light most favorable to the plaintiff, he ruled "the case will go to the jurors on all counts."[58]

At the close of proofs, there was considerable discussion in chambers concerning appropriate jury instructions. Defendants asked the trial court to read SJI2d 11.01, the standard (now model) civil jury instruction on comparative negligence. The defendants also asked the court to instruct the jury on the open and obvious danger doctrine.[59]

As for the standard comparative negligence instruction, the trial court stated, "I know you did present that to me," but "I do not see comparative negligence as being a part of this case, even though you made that strong objection in chambers."[60] Defendants later renewed their objections to the lack of a comparative negligence instruction.[61]

The request for an open and obvious danger instruction precipitated some confusion, with the trial judge originally indicating in chambers that the question would go to the jury, but then indicating after a lunch break that he would not allow the open and obvious question to go to the jury.[62] Defendants' objection to that ruling was also noted on the record.[63]

The jury returned with a verdict in favor of plaintiff Sandra Fultz. The jury found that Creative Maintenance was negligent and that this negligence caused plaintiff injury.[64] The jury also found that there was a contract between the property owners and Creative Maintenance for snow plowing and salting services, but found that Creative Maintenance ***did not breach the contract***:

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[58] Apx 230a-231a.
[59] Apx 233a, 255a.
[60] Apx 233a.
[61] Apx 253a, 257a.
[62] Apx 255a.
[63] Apx 255a, 257a.
[64] Apx 260a.

> Question Eleven: Was there a contract between Comm-Co Equities and Creative Maintenance for snow plowing and salting services?
>
> Answer. Yes.
>
> Question Twelve: Did Creative Maintenance breach the contract?
>
> Answer. No.[65]

The jury awarded Sandra Fultz past economic and non-economic damages as well as future non-economic damages. Otto Fultz was awarded no damages. The judgment, with future damages reduced to present case value, plus statutory interest and costs, totaled $63,432.64.[66] Creative Maintenance was found to be 50% at fault, as were the premises owners.[67]

3. The Post-Trial Motions.

All the defendants moved for a judgment notwithstanding the verdict. Creative Maintenance argued that it owed plaintiff no duty above-and-beyond the performance of its contractual obligations.[68] It reminded the trial court that the jury found no breach of contract, and argued that it was therefore entitled to a judgment in its favor because the alleged nonfeasance -- failing to salt the parking lot -- could not give rise to an independent tort claim.[69]

Creative Maintenance also argued that because plaintiff had actual knowledge of the allegedly dangerous condition that caused her accident, it owed no duty to plaintiff based on the open and obvious danger doctrine.[70] The defendant property owners echoed this argument.[71]

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[65] Apx 261a.
[66] Apx 40a-42a, August 26, 1999 Judgment.
[67] *Id.* See also Apx 261a.
[68] Apx 267a.
[69] Apx 267a-268a, 273a.
[70] Apx 268a.
[71] Apx 276a-277a.

Finally, Creative Maintenance argued, along with its codefendants, that the trial court erred in failing to instruct the jury on comparative negligence.[72]

The trial court denied defendants' JNOV motions, stating simply that it was satisfied that the jury had heard the evidence and that "their ultimate verdict was a proper one."[73]

4. The Appeal to the Court of Appeals.

Both defendants appealed the trial court's judgment, raising a variety of arguments.

Creative Maintenance first argued that it owed plaintiff no duty of care because plaintiff could be no more than a mere third-party beneficiary of the snow-removal contract, and it had not breached the contract. The Court of Appeal rejected this argument. The court relied heavily on its previous decision in *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995), and indicated that because Creative Maintenance plowed only once on the day of plaintiff's fall, and failed to salt the parking lot, it had breached "a duty to use reasonable care in removing dangerous ice and snow, which was distinct from its obligations under its contract with Comm-Co."

The Court of Appeals also rejected Creative Maintenance's argument that the trial court erred in refusing to instruct the jury on comparative negligence. The Court of Appeals conceded that it was "evident that plaintiff had actual notice of the icy conditions," but concluded that plaintiff "would have been required to traverse the ice no matter what route she took." The panel contended that there was no proof that plaintiff's handling of her four bags of groceries played any role in causing her accident. The Court of Appeals saw no need for a comparative negligence instruction.

Finally, the Court of Appeals rejected Creative Maintenance's argument that it was relieved of any duty to warn or protect plaintiff based on the open and obvious danger doctrine.

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[72] Apx 268a.
[73] Apx 281a.

The court concluded that Creative Maintenance could not rely on that defense because it was not the premises owner:

> Last, Creative Maintenance argues that the trial court erred in failing to instruct the jury regarding the open and obvious doctrine. We reject this argument. Creative Maintenance was not the premises owner. Plaintiffs' claim against Creative Maintenance was based on the company's failure to perform under its snow removal contract in a reasonable manner. The open and obvious doctrine applies to premises liability claims. Thus, the open and obvious nature of the risks was not pertinent to plaintiffs' claims against Creative Maintenance and the trial court properly denied Creative Maintenance's request for a jury instruction on the subject. (Slip Op, p 8)

The Court of Appeals did not reach the merits of the open and obvious danger argument made by the property owners, either. The panel found that because the property owners were defaulted for alleged discovery abuses, the duty element was resolved by default. The owners, therefore, could not challenge the existence of a duty based on the doctrine. (Slip Op, p5).

This Court granted Creative Maintenance's Application for Leave to Appeal and directed the parties to include the following, among the issues to be addressed:

> (1) under what circumstances, if any, plaintiff can establish a duty owed to her based on a contract to which plaintiff was not a party, where neither party to the contract owes plaintiff that duty outside the contract, and (2) whether, in a premises liability action, the defenses available to the landowner are available to a contractor acting for the landowner.

ARGUMENT I

Creative Maintenance's only relationship to the parking lot where plaintiff fell is a contractual one to plow snow after one-and-one-half to two inches fell and apply salt if necessary. Creative Maintenance's duties are grounded, not in possession or control of the lot, but *only* in contract. The jury decided Creative Maintenance did not breach its contract. Plaintiff's negligence claims are not viable.

A. Preservation of this issue.

In the trial court, Creative Maintenance moved for a directed verdict, and later for judgment notwithstanding the verdict, arguing that it was only obligated to fulfill its contractual obligations to the landowner and owed no independent duty to plaintiff.[74] Creative Maintenance also asserted this argument on appeal.[75] The Court of Appeals *Derbabian v Mariner's Pointe Assocs*, 249 Mich App 695; 644 NW2d 779 (2002) decision was not released until after the appeal was argued and, therefore, Creative Maintenance's arguments based on *Derbabian,* including the argument based on the lack of possession or control of the premises, were not specifically raised until Creative Maintenance's Motion for Rehearing in the Court of Appeals.

B. The standard of review is de novo.

Questions of duty are threshold legal issues decided by courts as a matter of law. See, e.g., *Mason v Royal Dequindre*, 455 Mich 391, 397; 566 NW2d 199 (1997); see also *Riddle v McLouth Steel*, 440 Mich 85, 95; 485 NW2d 676 (1992). "This Court reviews questions of law under a *de novo* standard of review." *Byker v Mannes*, 465 Mich 637, 643; 641 NW2d 210 (2002).

This is true of directed verdict motions, *Phinney v Perlmutter,* 222 Mich App 513, 524-525; 564 NW2d 532 (1997), and motions for judgment notwithstanding the verdict *Hord v*

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[74] Apx 227a; Apx 267a.
[75] Apx 51a, Court of Appeals Opinion, p 6.

Environmental Research, 228 Mich App 638, 641; 579 NW2d 133 (1998) case remanded 459 Mich 960; 590 NW2d 576 (1999). Under *de novo* review, an appellate court gives no deference to the trial court and reviews the case with fresh eyes. *Fletcher v Fletcher*, 200 Mich App 505, 512; 504 NW2d 682 (1993), aff'd in part rev'd in part on other grounds 447 Mich 871; 526 NW2d 889 (1994).

In reviewing lower court decisions on motions seeking directed verdict or judgment notwithstanding the verdict, appellate courts must review all the evidence and all legitimate inferences in the light most favorable to the non-moving party and, if the evidence fails to establish a claim as a matter of law, the motion should be granted. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000) (directed verdict); *Forge v Smith,* 458 Mich 198, 204; 580 NW2d 876 (1998) (JNOV).

C. Snow removal contractors owe only the duty to perform their contract.

Plaintiff's Second Amended Complaint alleged that Creative Maintenance had a "duty to remove all snow and ice from the driveways and common walkways" at Farmer Jack's.[76] Plaintiff claimed this duty was "breached" "in contravention of the common law of the State of Michigan and in contravention of its contract."[77] Plaintiff tried her case with proofs directed to showing—not that the snow plowing or salting was improperly performed—but that such services should have been performed, again, nearer to the time of her fall. The jury decided Creative Maintenance had a contract with the parking lot owners but that the contract had *not* been breached.[78] Nevertheless, the jury found that Creative Maintenance was negligent and that its negligence had caused plaintiff's injury.[79]

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[76] Apx 8a, Second Amended Complaint, ¶24.
[77] Apx 8a-9a, Second Amended Complaint, ¶25.
[78] Apx 261a.
[79] Apx 260a.

1. Snow removal contractors do not owe the duties owed by possessors of premises.

The tort-infused premises liability duty to take reasonable measures within a reasonable period after an accumulation of snow and ice to diminish the hazard of injury to invitees falls only upon those who possess and control property. *Quinlivan v Great Atlantic & Pacific Tea*, 395 Mich 244, 261; 235 NW2d 732 (1976). "It is well established that 'premises liability is conditioned upon the presence of both possession and control over the land'." *Kubczak v Chemical Bank &* Trust, 456 Mich 653, 660; 575 NW2d 745 (1998), quoting *Merritt v Nickelson,* 407 Mich 544, 552; 287 NW2d 178 (1980) and *Orel v Uni-Rack Sales*, 454 Mich 564, 568; 563 NW2d 241 (1997). The principle behind the requirement of "actual possession and control," is that "liability for an injury due to defective premises ordinarily depends upon power to prevent the injury" and such power does not exist in the absence of possession and control. *Kubczak*, *id* at 662.

"Possession" means the "right under which one may exercise control over something to the *exclusion of all others*." *Derbabian v Mariner's Pointe Associates*, 249 Mich App 695, 703, 644 NW2d 779 (2002) quoting *Black's Law Dictionary (7th Ed)* [emphasis in *Derbabian*]. "Control" means "exercising restraint or direction over; dominate, regulate or command." *Derbabian* at 703 quoting *Random House Webster's College Dictionary* (1995). A snow removal contractor's entry onto land under a contract that merely requires it to plow snow and salt when needed does not establish a transfer of possession and control. *Derbabian* at 703-704. Summary disposition in favor of the snow removal contractor was affirmed in *Derbabian.*

In accord with *Derbabian*, see *Golembiewski v Jarzembowski Funeral Home,* unpublished per curiam opinion, COA No. 238083, released March 11, 2003 (2003 Mich App LEXIS 592), Exhibit A. The panel reports that plaintiff claimed defendant/Appellee Woody's Landscaping "breached its oral contract with the funeral home by failing to take reasonable

steps to remove snow and ice from the parking lot." *2. Summary disposition affirmed: "A defendant who does not own or control premises on which an injury occurs cannot be held liable under a premises liability theory." *6.

Nothing in the facts put before the jury evidences that Creative Maintenance had the requisite relationship of possession and control. Creative Maintenance did not have exclusive authority over the lot. It did not have actual possession of the lot at the time of plaintiff's fall.

Michigan's case law has consistently held that courts, not juries, determine what characteristics must be present for a relationship to give rise to a duty. *Smith v Allendale Mutual*, 410 Mich 685, 714; 303 NW2d 702 (1981). Whether a duty exists presents a question of law. *Riddle v McClouth Steel Products*, 449 Mich 85, 95; 485 NW2d 676 (1992). "[T]he court determines the circumstances that must exist in order for a defendant's duty to arise." *Riddle*, *supra* at 95. Under the well-reasoned rationale of *Derbabian*, defendant was entitled to judgment as a matter of law in its favor.

Creative Maintenance owed no duty to the public-at-large, or to plaintiff in particular, to remove snow on Farmer Jack's parking lot or to salt the lot. To the contrary, Creative Maintenance's duties *only* arose as a result of a contract between itself and the parking lot's owner, Comm-Co. The jurors spoke on the question of whether Creative Maintenance breached its contract with Comm-Co. They answered, "No." A contract existed but it was not breached. Defendant Creative Maintenance submits that the jury's answer squelched *all* possibility that plaintiff's cause of action against it could somehow be salvaged. *Derbabian* got it simple and it got it right.

2. ***Snow removal contractors who perform their contract in a non-breaching manner cannot be liable for allegedly negligent snow or ice removal.***

Other Court of Appeals panels have previewed the reasoning and result in *Derbabian*. These panels approached the issue from the perspective of whether the snow removal contractor had performed appropriately, given the services it contracted to provide.

In *Joyce v Barry Rubin*, 249 Mich App 231, 642 NW2d 360 (2002), the panel examined the ability of a plaintiff to sue a premises owner's snow removal contractor. Rubin was a live-in employee of the homeowner. She took a new job and, while leaving the home with her personal belongings, she fell in the snow-covered driveway. First the panel affirmed the grant of summary disposition as to the premises owner, based on application of open and obvious danger doctrine. Next the panel turned to the question of whether the plaintiff had raised any material fact issue regarding whether the snow removal defendants had "breached their duty to perform the snow removal contract with ordinary care." *Joyce* at 243.

The *Joyce* panel examined whether there was any evidence to support the claim that the snow removal contractors were negligent for "failing to shovel and salt the Rubin's walkway." *Id* at 244. According to the contract between the contractor and the homeowner, plowing was required with a snowfall of 2 inches. The area where plaintiff fell was to be salted. There was no evidence that two inches of snow had fallen on the date of Joyce's fall. *Id* at 246. Essentially, plaintiff claimed that the contractor had a duty to maintain the property "in a reasonably safe manner, above and beyond the terms of the snow removal agreement." *Id* at 245. That, of course, is the equivalent of Sandra Fultz' claim now that the jury has spoken to the issue and found that Creative Maintenance did not breach its contract with Comm-Co.

Joyce's claim was found defective, as a matter of law. Given that there was no evidence that the contractor had "failed to perform, with ordinary care, the services unambiguously outlined in the contract," there was no issue of fact to be tried. The contract

sets the parameters of the duty owed. Applied here, once the jury found no breach of contract, necessarily there could be no breach of any tort-infused duty.

Osman v Summer Green Lawn Care, 209 Mich App 703, 532 NW2d 186 (1995) is authority for the same result. That panel was clearly impressed with the power of language in the snow removal contract to define potential liability. The plaintiff fell on ice that formed because the contractor had improperly piled the snow where melt would re-freeze and endanger those using the walkways. Though the contract stated that liability for weather conditions beyond the contractor's control and the inability to remove ice and snow to the bare pavement would not be assumed, it *also* said that the contractor was not "relieved from liability" for "damages caused to person or property as a result of [the contractor's] . . . negligence." *Osman* at 209 Mich App 707. Creative Maintenance's oral contract with Comm-Co, of course, contained no such agreement to assume the premises owner's liability. The *Osman* panel decided that this language acknowledging potential liability meant the contractor had agreed to be liable to third parties for any negligent snow removal:

> Read as a whole, the contract requires defendant to provide snow removal services in a reasonable manner, holding defendant liable for its negligent conduct in the snow removal process. *Id.*

One of the reasons why the *Osman* panel was willing to allow the case to go forward to its proofs was because: "The contract does not shield defendant from liability to plaintiff." *Id* at 709. By contrast, in the present case the parties' oral contract only obligated Creative Maintenance to plow with one-and-one-half to two inches of snowfall and salt, if necessary. Nothing in the contract evidences that Creative Maintenance assumed the liability of the premises liability defendants who possessed and controlled the parking lot.

The principle that, once a snow removal contractor performs under the contract without any breach of contractual duty, it has also fulfilled its tort-based duty, was also the holding of the Court of Appeals panel in the unpublished case of *Schenk v First of America*, 1998 Mich

App LEXIS 709 (Exhibit B). Again Michigan winter spawned a lawsuit over a fall on an icy parking lot. The Bank that owned the lot was sued, as well as the snow removal contractor. Both defendants were granted summary disposition and that result was affirmed on appeal. The premises owner owed the licensee/plaintiff no duty to make open and obvious dangers safe or to warn of such dangers. In addition, the owners' only duty to licensees with respect to natural accumulations was to take no affirmative action to increase the hazard. *Id* at *5-6. The panel could "find no basis for holding the contractor liable." *Id* at *8. Absent any breach of the contract, the third party beneficiary status plaintiff aspired to was of no help:

> [The snow removal contractor] maintain[ed] that the contract did not call for any service on the day that plaintiff fell, and plaintiff points to no specific provision of the contract that was breached. *Id* *8.

The snow removal contractor in *Schenk*, as here, had not committed any act of misfeasance, since the contractor "took no action to remove the ice upon which plaintiff slipped and did not alter the conditions of the parking lot so as to increase the hazards of winter accumulations" *9. The record was accepted as being devoid of any evidence, either of a breach of contract or of actions that could constitute actionable negligence.

Plaintiff Fultz' claim was not just an assault on the citadel of privity, she was allowed to build an entirely new citadel. Once the jury concluded that Creative Maintenance had fulfilled its contract calling for snow removal and salting, an injured third party should not be able to claim tort liability grounded in that contract. In addition, under *Derbabian* as applied to the evidence put before the jury, the contractual relationship between Creative Maintenance and the parking lot owner was devoid of the requisite possession and control and, with that, devoid of potential liability for failure to salt.

ARGUMENT II

Suit in tort for injuries allegedly arising out of negligent performance of a contract cannot be maintained absent proof of *mis*feasance. *Rinaldo's Construction v Michigan Bell*, 454 Mich 65 (1997). Plaintiff complains Creative Maintenance negligently failed to salt Farmer Jack's lot near enough in time to her fall to remedy icy conditions. Only non-actionable *non*feasance (passive inaction) was arguably demonstrated.

A. Preservation of the issue and the standard of review.

As with issue I, that negligent performance of a contract requires a showing of *mis*feasance was preserved via directed verdict motion and JNOV. It was argued in the Court of Appeals.

As with Issue I, the standard of review on this question of law is *de novo*.

B. Negligence claims against snow removal contractors are not actionable in the absence of proof of misfeasance.

As this Court observed in *Rinaldo's Construction v Michigan Bell*, 454 Mich 65, 83, 559 NW2d 647 (1997), "whether an action in tort may arise out of a contractual promise has not been without difficulty." But Michigan case law is firmly rooted in traditionally-honored principles distinguishing between misfeasance (actionable) and nonfeasance (not actionable). The key case in the modern era is *Hart v Ludwig*, 347 Mich 559; 79 NW2d 875 (1956). *Rinaldo's Construction* applied *Hart's* teachings some 40 years later.

Hart involved, as here, an oral contract. Defendants agreed to care for plaintiff's orchard. The orchard deteriorated and was damaged by animals. No negligence action was maintainable. The court examined and applied the "time-honored formula," "the important distinction" "the general rule," *id* at 561, 562, 564, that tort actions cannot be premised upon mere non-performance of a contract. The Court affirmed an order dismissing plaintiff's tort claim, since "we have simply the violation of a promise to perform the agreement." *Id* at 565. The *Hart* court examined case law from across the country recognizing that a tort action "has

for its foundation the negligence of the defendant, and this means more than a mere breach of a promise." *Id* at 563. "There must be some breach of duty distinct from breach of contract." *Id.*

The dividing line, the *Hart* Court observed, is "between misfeasance, which may support an action either in tort or on the contract, and the nonfeasance of a contractual obligation, giving rise only to an action on the contract." *Id* at 564. Because the facts in *Hart* showed only a failure to perform the services the contract required, no separate legal duties were implicated and no tort action was available:

> What we are left with is defendant's failure to complete his contracted-for performance. This is not a duty imposed by the law upon all, the violation of which gives rise to a tort action, but a duty arising out of the intentions of the parties [to the contract] themselves and ***owed only to those specific individuals to whom the promise runs***. A tort action will not lie. *Id* at 565 [emphasis added]

The *Hart* court required that, even a party to the contract, must show an affirmative act of negligence before a tort action can go forward:

> As a general rule, ***there must be some active negligence or misfeasance to support tort***. There must be some breach of duty distinct from breach of contract. *Hart* at 563 [emphasis added].

The division between misfeasance and nonfeasance is crucial.

These principles are by no means antiquated. They appear, undiminished, in Michigan's modern cases. In the 1997 *Rinaldo's Construction* case, *supra*, this Court affirmed the principles articulated in *Hart*. The issue in *Rinaldo's Construction* concerned the Michigan Public Service Commission's primary jurisdiction over claims against a phone company. But in order to answer that question, the Court needed to decide whether there was any valid basis for an independent tort action against the phone company (which would give rise to general jurisdiction in a circuit court), for failing to provide the contracted-for phone service. Plaintiff moved its business to a new location but the transfer of its phone service was a disaster. Its

service was so disrupted that significant profits were lost, all allegedly due to the phone company's assorted negligent acts.

This Court ruled that no negligence claim could go forward. The phone company owed the duties plaintiff alleged, including to employ competent personnel and maintain its equipment in proper repair, "but [these duties] arose solely out of the contractual relationship between the parties and not from any independent legal obligations supporting a cause of action in tort." *Id* at 79. After summarizing *Hart* and quoting from it extensively, the Court summed up the core principle:

> In other words, the threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation. *Rinaldo's Construction* at 84.

Although the *Rinaldo's Construction* court agreed with the plaintiff's allegations that the phone company owed plaintiff a duty to conduct its business in a reasonable manner, it concluded that those duties "arose solely out of the contractual relationship between the parties and not from any independent legal obligations supporting a cause of action in tort." *Id* at 78-79. This Supreme Court affirmed the Court of Appeals' decision, quoting approvingly to the Court of Appeals' panel's opinion recognizing that the mere failure to perform a contractual obligation cannot give rise to a negligence claim:

> In a contractual setting, a tort action must rest on a breach of duty distinct from contract...The mere failure to perform an obligation under a contract cannot give rise to a negligence cause of action in tort...The instant defendant does not owe a general duty to provide and maintain telephone service to the public at large. To the contrary, defendant's "duty" to do so only arises as a result of a contractual agreement between defendant and a specific individual or entity...Absent the contract for telephone service...defendant did not have a "duty" to provide and maintain the phone service in question. *Id* at 82 (as edited by the Supreme Court, quoting the Court of Appeals unpublished opinion).

These concepts were summarized in *Williams v Cunningham Drugs*, 429 Mich 495; 418 NW2d 381 (1988), a case examining premises owner liability for the criminal act of a third

party. The *Williams* court also emphasized the crucial distinction between acting negligently and failing to act:

> In determining standards of conduct in the area of negligence, the courts have made a distinction between misfeasance, or active misconduct causing personal injury, and nonfeasance, which is passive inaction or the failure to actively protect others from harm. The common law has been slow in recognizing liability for nonfeasance because the courts are reluctant to force persons to help one another and because such conduct does not create a new risk of harm to a potential plaintiff. Thus, as a general rule, there is no duty that obligates one person to aid or protect another. *Williams* at 498-499.

The core principle is that alleged acts of *mal*feasance, rather than mere *non*feasance, must exist before an independent tort action can arise from non-performance of a contract. This core principle is as firmly grounded in the "third party" context as it is when a defendant is sued in tort by the party who it contracted with.

These principles were recently considered and applied in *Derbabian, supra*, the published fall-on-ice-in-a-parking-lot case released by the Court of Appeals just before the present case. The plaintiff in *Derbabian* was a customer who slipped and fell in an icy shopping center parking lot. She sued the parking lot owner on a theory it had negligently maintained the lot and had failed to inspect for dangerous conditions. In an amended complaint, she sued the snow removal contractor. The contractor had not plowed the lot for eight days and had not salted for at least four days before plaintiff fell, even though it had rained for a few hours the day before the fall. The defendant's contract with the premises owner required it to "plow the parking lot when plowing was needed" and to "salt the parking lot when [the contractor] determined salting was necessary." *Id* at 704.

First the Court of Appeals rejected the premises law argument that the snow removal contractor's liability could legitimately be based on a claim that it was in possession and

control of the parking lot or that it had notice of the condition. Then the panel summarized the evidence:

> [T]he evidence did not establish that defendant negligently plowed or salted the parking lot or that defendant had actual knowledge of the dangerous condition; rather, at best, the evidence proved merely that defendant did not inspect and salt the parking lot on the morning of plaintiff's fall. *Derbabian* at 708.

Derbabian, like the present case, was not one where a snow removal contractor "acted under the contract but did so negligently," but a case "derive[d] from defendant's alleged nonperformance of the contract." *Id* at 707. Stated otherwise:

> [Derbabian] ha[d] not alleged that defendant negligently performed a contract, rather, plaintiff alleged that defendant was negligent because of its failure to perform a contract. *Id* at 708.

Such allegations were not enough. Not in *Derbabian*, and not here. The jury verdict in plaintiff's favor was reversed and the case was remanded to the trial court with instructions to enter an order granting summary disposition in favor of the snow removal contractor. *Derbabian* summarized the rule that governed:

> Because defendant had no common law duty to plow, inspect or salt the parking lot in which plaintiff was injured, we find that defendant did not breach a duty of due care to plaintiff when it failed to inspect the parking lot on the day in question, and that plaintiff does not have an independent tort action against defendant. *Id.*

Derbabian is on "all fours" with the present case. Why the panel chose to ignore its holding, in clear violation of MCR 7.215(I)(1) governing the precedential effect of a published Court of Appeals decision, and chose instead to chart an independent path that does not square with case precedent is unknown. How Judge Zahra could join the Judge Wilder-authored opinion in *Derbabian*, but also sign on to the *per curiam* opinion in the present case that thumbs its nose at *Derbabian*, is unknowable. *Derbabian* respects the core principle that a contract relationship to the premises can only be translated into a tort-actionable duty when the

contracting party has performed its contract but has done so in a negligent manner that affirmatively creates the risk that injures the plaintiff.

Also honoring this Court's crucial distinction between nonfeasance (not actionable) and misfeasance (actionable), see as well: *Carrington-Lee v Detroit Entertainment*, 2002 Mich App LEXIS 1298 (Exhibit C) (plaintiffs injured by defendant's contract to hire minority Detroit residents state no tort claim since "the essence of plaintiff's claim was the nonperformance of contractual obligations and the claim thus was not viable" pointing to the failure "to make any affirmative allegations of misfeasance or active negligence that could support an independent action in tort against defendant regardless of a contractual breach"); *Sherman v Sea Ray Boats*, 251 Mich App 41; 649 NW2d 783 (2002) (as applied to boat owner's tort claim against manufacturer: an action in tort may not be maintained where a contractual agreement exists, unless a duty, separate and distinct from the contractual obligation, it established and "if the omission is one of nonfeasance, a failure to act, the action lies in contract only"); *Freeman-Darling v Andries-Storen Reynaert*, 147 Mich App 282; 382 NW2d 769 (1985) (one subcontractor's negligence claim against another subcontractor premised upon that sub's failure to properly perform its contract failed: "The contractual relationship was not merely the occasion of a duty arising by operation of law; rather, the entire existence of the duty depended upon the contract promise"); *Nelson v Northwestern Savings & Loan*, 146 Mich App 505; 381 NW2d 757 (1985) (the mortgage agreement between the parties created no tort claim possibilities when the S & L failed to pay insurance premiums since the only duty breached was a contract term and nonfeasance in the performance of a contract cannot be the basis of a tort action).

Courtright v Design Irrigation, 210 Mich App 528; 534 NW2d 181 (1995) illustrates the crucial distinction between misfeasance and nonfeasance in another slip-and-fall case. The plaintiff fell trying to shut off a broken sprinkler system valve near her condominium. Design

Irrigation was under contract with the condo association to drain and winterize the sprinkler system. It performed that job negligently, left water in the pipes, and the pipes burst. Plaintiff fell wading through a "small flood." *Id* at 530. Courtright was permitted to sue the sprinkler irrigation company for the negligent performance of its contract since it had affirmatively created the condition that injured her.

The *Courtright* panel understood that the distinction between misfeasance (actionable) and nonfeasance (non-actionable) governed:

> ***Misfeasance is negligence during performance of a contract.*** While performing a contract, a party owes a separate, general duty to perform with due care so as not to injure another. Breach of this duty may give rise to tort liability. *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). The duty to act with due care encompasses the duty to prevent injury from a peril created during performance. See *Hart*, *supra* at 565. In contrast, ***failure to perform a contract constitutes nonfeasance and gives rise only to a suit for breach of contract.*** *Id* at 530 [emphasis added].

Clearly, the plaintiff in *Courtright* complained of contractor *mis*feasance. That threshold hurdle being satisfied, the case was permitted to go forward to its proofs.

This case is not *Courtright*. Plaintiff did not complain of negligence during defendant's salting or plowing. Defendant Creative Maintenance did not, for example, pile snow improperly so that it melted and caused a hazard or use the wrong kind of salt. Instead, Sandra Fultz clearly complained of defendant's *non*performance of its contract. She contends Creative Maintenance should have salted the lot, closer to the time of her fall. This is alleged nonfeasance. It does not potentially give rise to a tort action.

Osman v Summer Green Lawn Care, 209 Mich App 703, 532 NW2d 186 (1995) reaches the same result as *Courtright*, even though the *Osman* panel did not articulate the misfeasance/nonfeasance rules. In fact however, Osman clearly claimed misfeasance against the snow removal contractor and that is what potentially opened the door to tort recovery. The plaintiff fell on ice that formed because of an affirmative negligent act during the contractor's

plowing. It had piled plowed snow "on a portion of the premises when it knew... that the snow would melt and freeze into ice on the abutting sidewalk, steps and walkways." *Id* at 704. Plaintiff "claimed that a duty arose because defendant created a hazardous condition that caused plaintiff's injuries." *Id* at 705.

The summary disposition that the trial court had granted in *Osman* was reversed on appeal. The panel accepted that though the plaintiff was "not owed a duty under the contract itself, the contract is the basis out of which arises defendant's common law duty to plaintiff." *Osman* at 708. Given an alleged case of contractor *mis*feasance, defendant Creative has no quarrel with the end result in *Osman*, though its reasoning is flawed for failure to consider the misfeasance/nonfeasance issue.

What should have happened, by application of this governing case law, is that plaintiff's case should never have been sent to the jury. Directed verdict should have been granted. The complaint that more-timely snow or ice removal service was not provided to the parking lot's owner does not translate into a tort-actionable claim.

ARGUMENT III

The open and obvious danger doctrine that reins in the possessor's premises liability applies with equal force to all claims against snow removal contractors. There is no legal or public policy-cognizable reason why the liability of one who contracts to enter onto another's land to plow snow and salt should have liability for snow and ice accumulations that is greater than the property possessor's own liability.

A. Preservation of the issue.

During trial, Creative Maintenance joined in the defendant-property owners' motion for a directed verdict based on the open and obvious danger doctrine, but the motion was denied.[80] The trial court having denied the directed-verdict motion, Creative Maintenance requested a

[80] Apx 225a-227a.

jury instruction on the doctrine, as contemplated in this Court's decision in *Riddle v McClouth Steel Products*, 440 Mich 85; 485 NW2d 676 (1992), but the trial court again refused.[81] Finally, after the adverse jury verdict, Creative Maintenance moved for a judgment notwithstanding the verdict, based in part on lack of any legal duty given the open and obvious nature of the hazard that plaintiff encountered. But the trial court likewise denied that motion.[82] The issue was raised on appeal, and the Michigan Court of Appeals ruled on it.

B. Standard of review.

The open and obvious danger doctrine is "an integral part" of the definition of the legal duty owed to invitees. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Threshold duty issues are decided by courts as a matter of law. See, e.g., *Mason v Royal Dequindre*, 455 Mich 391, 397; 566 NW2d 199 (1997); see also *Riddle*, 440 Mich at 95. "This Court reviews questions of law under a *de novo* standard of review." *Byker v Mannes*, 465 Mich 637, 643; 641 NW2d 210 (2002).

Likewise, claims of instructional error raise issues of law that are reviewed *de novo*. *Case v Consumer Powers,* 463 Mich 1, 6, 615 NW2d 17 (2000); *Burnette v Bruner*, 247 Mich App 365, 375; 636 NW2d 773 (2001). Reversal based on instructional error is required where failure to do so would be inconsistent with substantial justice. MCR 2.613(A) and *Johnson v Corbett,* 423 Mich 304, 326; 377 NW2d 713 (1985).

C. The problem at ground level.

Michigan parking lots can be treacherous places in the winter. They are typically open areas where wind will blow and snow will drift. Precipitation and wind temperature conditions can vary greatly, from hour to hour and from place to place even within a confined territory. Weather forecasting is no exact science. It is certainly no reliable predictor of snow or ice at

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[81] Apx 233a, 255a-257a.
[82] Apx 268a.

any particular location. The lots being plowed are subject to conditions that snow removal companies have no control over. Like whether the pavement itself has deteriorated. Obstructions, such as parked cars, impede snow removal efforts. Cramped space for piling snow is a challenge on virtually every lot. Speed bumps, curbs, potholes—all conspire to confound snow and ice removal. The lots themselves are sometimes inadequately lit. But still the customers come, come darkness, come rain, sleet, snow, and ice. They come, like Sandra Fultz, carrying four bags of groceries weighing twenty five pounds, her purse, and a jug of milk, and decide to carry all that, in the dark, while walking over what Mrs. Fultz admits she knew was an unsalted sheet of ice covering the lot.

No one claims that store employees like Sandra Fultz, or customers for that matter, ought to have to traverse parking lots entirely at their own risk. But, in some sense, the development of Michigan premises liability law in recent years has been a story of bringing common sense to bear upon the problem of liability for falls that occur under such intractable, but common, conditions.

Well-defined, powerful defenses have been supplied, and justly so, to owners and others who possess and are therefore positioned to control property. The possessor relationship is one that puts a party in the cat-bird-seat in terms of being able to remedy dangerous conditions and thus prevent harm to its invitees and others. Such a relationship does not exist for those who are merely under contract to push the snow or to salt.

If this Court were to somehow see potential for negligence-based liability against a snow removal contractor, either based on premises law or on theories of negligent performance of a contract that has not been breached, then a snow removal contractor's liability should be no greater than the property possessor's liability. If the undisputed material facts would permit a property owner to secure summary disposition or directed verdict based on open and obvious danger, so should the snow removal contractor. If there is a jury question on the issue of open

and obvious danger, that jury question exists for the snow removal contractor just as surely as it exists for the owner of the property or for the company that manages the property.

The open and obvious danger rule's public policy underpinnings fully embrace a narrow extension of the rule to apply in cases where a snow-removal contractor's potential liability arises from allegedly dangerous snow or ice conditions on the premises. A snow-removal contractor, even though it does not own or possess the premises, may nevertheless invoke the open and obvious danger defense where its liability arises from a purported failure to prevent accumulations of ice or snow.

D. Michigan's Open and Obvious Danger Doctrine.

The elements of a negligence claim are: (1) the defendant *owed a legal duty* to the plaintiff, (2) the defendant breached that duty, (3) plaintiff suffered damages, and (4) the defendant's breach of duty was the proximate cause of plaintiff's damages. *Riddle,* 440 Mich at 96, n10. In suits against the land possessors, the legal duty has been held to extend "to hidden or latent defects." *Id* at 91. Absent unusual circumstances, the essential duty element cannot be satisfied if the condition allegedly causing injury was known, or was open and obvious:

> [W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee. *Id* at 96.

- As this Court observed in *Lugo v Ameritech*, 464 Mich 512, 516; 629 NW2d 384 (2001), "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty."

In *Lugo*, this Court succinctly summarized the open and obvious danger rule. "In sum, the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk

unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id* at 517.

So, for example most recently in *Perkoviq v Delcor Homes-Lake Shore Pointe,* 466 Mich 11; 643 NW2d 212 (2002), this Court precluded liability for a contractor's employee's slip on defendant's roof. There was "no evidence that the condition of the roof was unreasonably dangerous for purposes of premises liability," *id* at 19, though the sloped roof was covered with some combination of ice, snow and frost. *Id.* To show "special aspects" that would potentially make the roof unreasonably dangerous, the plaintiff would need to show some condition that differentiated the roof from "the typical sloped rooftop containing ice, snow or frost." *Perkoviq*, 466 Mich at 20. Summary disposition in favor of the premises owner, who also happened to be the general contractor, was affirmed in *Perkoviq.* Only premises liability was at issue on appeal. *Id* at n4.

The open and obvious danger doctrine applies both to claims that a defendant failed to warn about a dangerous condition, and to claims that the defendant failed to "protect" the invitee by allowing the dangerous condition to exist in the first place. See *Riddle* at 96 (recognizing that where a danger is open and obvious, the defendant "owes no duty *to protect* or warn the invitee" [emphasis added]); see also *Lugo, supra* at 517 (a defendant "is not required to protect an invitee from open and obvious dangers"); *Millikin v Walton Manor*, 234 Mich App 490, 495; 595 NW2d 152 (1999) (in accord).

"Whether a danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection." *Millikin*, 234 Mich App at 497; see also *Novotney v Burger King Corp. (On Remand),* 198 Mich App 470, 475; 499 NW2d 379 (1993). A court "looks not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger." *Hughes v PMG Bldg*, 227 Mich App 1, 11; 574 NW2d 691 (1997). Open

and obvious dangers are conditions that create a risk of harm that "is visible," that present "a well know danger," or one "discernible by casual inspection." *Glittenberg v Doughboy Recreational Industries*, 441 Mich 379, 392; 491 NW2d 208 (1992). "Thus, one cannot be heard to say that he did not know of a dangerous condition that was so obvious that it was apparent to those of ordinary intelligence." *Id.*

E. The doctrine's policy underpinnings and rationale.

Michigan's open and obvious doctrine reflects the view that once an invitee knows or should know of an apparent risk, the "social policy" for imposing a legal duty is overridden by countervailing policies favoring a limitation on the scope of that duty, and "encouraging people to take reasonable care for their own safety." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609, 614, 616-617; 537 NW2d 185 (1995). As this Court commented in *Bertrand*, where the danger is known or obvious, the risk of harm is simply "not unreasonable" absent some special aspect that makes the condition unusual or highly dangerous. See *id* at 617; see also *Lugo*, 464 Mich at 517-520.

Although the phrase is so often repeated that its import is sometimes taken for granted, it remains true that premises possessors "are not absolute insurers of the safety of their invitees." *Bertrand*, 449 Mich at 614. "The overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land" to make ordinary conditions on the premises "foolproof." *Id* at 616.

And where an invitee encounters "the type of everyday occurrence that people encounter," such as ordinary stairs having no unusual qualities, the law trusts that "under most circumstances, a reasonably prudent person will look where he is going, will observe the steps [or other condition], and will take appropriate care for his own safety." *Id.* The same is true for the typical imperfections found in parking lots, such as the pot hole in *Lugo*, *supra*, and for common conditions such as snow and ice during a Michigan winter. See, e.g., *Perkoviq v*

Delcor-Holmes, 466 Mich 11; 643 NW2d 212 (2002) (frost and ice on roof is a "classic example" of "an open and obvious danger in a premises liability setting"), *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002) (slippery snow covering sidewalk presented an open and obvious danger); *Corey v Davenport College of Business*, 251 Mich App 1; 649 NW2d 392 (2002) (icy and snowy stairs presented an open and obvious danger).

This Court's observations in *Glittenberg, supra*, a product liability case involving an above-ground pool, aptly articulated these principles, and the *Glittenberg* Court's comments have been found equally instructive in the slip-and-fall context. See, e.g., *Novotney,* 198 Mich App at 473-474. The *Glittenberg* court observed that where a danger is known or obvious, a warning is unnecessary and would not make the product any safer:

> In a simple product situation, the warning leg of products liability for products in normal use presents no real risk/utility issue, nor does it serve to protect a knowledgeable user who is distracted or inattentive. Thus, the obvious nature of the danger serves the exact function as a warning that the risk is present. Reduced to its simplest terms, the obvious danger rule in the context of a warning with regard to a simple product is both fair and logical. Where a warning is not needed because the product's potentially dangerous condition (and not the consequences of ignoring that condition) is fully evident, providing a warning does not serve to make the product safer.
>
> There is no duty to warn as to the obvious danger of a simple product because an obvious danger is no danger to a "reasonably" careful person.
>
> [*Glittenberg*, 441 Mich at 395-396 (footnote omitted).]

In *Bertrand*, this Court considered open and obvious danger doctrine in the context of a fall on a step in a car dealership and explained that the finding of an open and obvious danger obviates the need for warnings:

> Because the danger of tripping and falling on a step is generally open and obvious, the failure to warn theory cannot establish liability. *Bertrand* at 614.

Popular annotations have also described the rationale for the "no duty" rule for open and obvious dangers, observing that courts have recognized that "an injured person's actual knowledge of a defect or a danger is obviously equivalent to, or perhaps better than, a warning." 62 Am Jur 2d, Premises Liability, §148. Other courts take the approach that because the duty owed to an invitee "applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls, and the like, which are not known to the invitee, and would not be observed or discovered by him in the exercise of ordinary care," the invitee is seen to assume "all normal, obvious, or ordinary risk attendant to the use of the premises." *Id.* "Stated otherwise, what the qualification of the rule of duty to exercise reasonable care means is that inasmuch as the invitee had knowledge of the danger, there is no duty on the part of the occupant to warn him of it, and it also means that if, having knowledge of the danger, the invitee exposes himself to it, he must take the premises as he finds them and there is no duty on the part of the owner or occupant to protect him from such danger, even by the use of reasonable care to eliminate it." *Id.*

F. The doctrine's policy underpinnings are just as compelling where an invitee who is harmed by a known or obvious condition on the land sues a snow-contractor that has contractually assumed a "piece" of the owner's general duty to maintain the premises.

The Court of Appeals' stated "sticking point" concerning Creative Maintenance's open and obvious danger argument was that Creative Maintenance was a snow-removal contractor, and "was not the premises owner." Court of Appeals' Opinion, p 8.

In three unpublished cases the Court of Appeals has not been concerned at all with making any distinction between an owner or possessor and a snow removal contractor when it comes to operation of the open and obvious danger doctrine. In *Bender v Saph*, Michigan Court of Appeals No. 237189, released February 11, 2003 (2003 Mich App LEXIS 297), Exhibit D, the opinion reports that "Defendants" motion for summary disposition was granted,

identifying "Danneels Landscaping and Snow Removal" as one of the defendant/appellees in a case involving a slip on ice on a parking lot. *1. Summary disposition in defendants' favor was affirmed, with the Court of Appeals substituting a ruling on open and obvious danger in place of the trial court's analysis that centered on lack of notice.

In *Laurain v Sparrow Hospital*, Michigan Court of Appeals No. 233429, released October 22, 2002 (2002 Mich App LEXIS 1447), Exhibit E, the opinion reports that the snow removal contractor, Dent Enterprises d/b/a Benjamin Parking Lot Maintenance Company, concurred in the owner's motion for summary disposition premised upon open and obvious danger. *2. At issue was a fall on snow and ice. Summary disposition in favor of defendants was affirmed. The openness and obviousness of the condition was not contested. The panel ruled that plaintiff failed to show any special aspects that made the condition unreasonably dangerous in spite of its open and obvious condition. *5.

Stubblefield v Eight Thousand Six Hundred Assocs, Michigan Court of Appeals, Case No. 208622, released March 7, 2000 (2000 Mich App LEXIS 2099), Exhibit F affirmed a trial court's decision to require a slip-and-fall plaintiff to post a surety bond where the trial court had already granted a snow-removal contractor's motion for partial summary disposition based on the open and obvious danger doctrine. Though the *Stubblefield* panel did not broach the question of whether the doctrine was properly applied on behalf of a snow-removal contractor, the case still speaks to the fact that when a snow-removal contractor is sued based on the condition of the premises where a slip-and-fall occurred, the open and obvious danger doctrine is a natural and logical fit.

See also, *Roberts v Stevens Enterprize d/b/a Quality Lawn Care*, Court of Appeals, Case No 203854, released May 11, 1999 (1999 Mich App LEXIS 954), Exhibit G, a pre-*Lugo* case against a snow removal contractor involving a fall on ice. The panel decided open and obvious danger doctrine did not obviate the snow removal contractor's duty because ice

dangers were not seen as obvious. However, the panel was perfectly willing to "assume, as both parties have, that defendant was entitled to invoke the open and obvious danger rule...". *2-3.

In one unpublished Court of Appeals cases, in addition to the present case, a panel of the Court of Appeals was unwilling to afford the open and obvious danger to the snow removal contractor: *Gratopp v Tanger Properties*, Court of Appeals, Case No. 237663, released February 28, 2003 (2003 Mich App LEXIS 542), Exhibit H (Snow removal contractor was not the owner of the property so application of the doctrine was erroneous).

Snow-removal contractors are uniquely situated. In general, a premises possessor owes a duty to exercise reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions on the land. See *Lugo*, 464 Mich at 516. This general duty is an ongoing one, and has many facets, particularly in the commercial shopping center scenario. When the land possessor or owner hires a snow-removal contractor, it has in essence relinquished a "piece" of its overall responsibility for maintaining a safe premises. Although for purposes of tort liability the premises owner or possessor may not "delegate away" its potential tort liability, it has nevertheless delegated a portion of its overall responsibility to maintain a safe premises to the snow-removal contractor. With regularity, the concept of a possessor of property "loaning" its possession or control to another party has found expression in Michigan premises liability law. See, e.g., *Orel v Uni-Rak Sales*, 454 Mich 564, 563 NW2d 241 (1997) (where plaintiff's employer, its employees, subcontractors and suppliers completely took over fenced parking lot while construction was underway, issue of fact on possession, relying on *Merritt v Nickelson*, 407 Mich 544, 552-553; 287 NW2d 178 (1980)).

So to the extent that a snow-removal contractor has contractually assumed a piece of the landowner or possessor's responsibilities, and has potentially become exposed to suits by third-party invitees for conditions on the land, it is logical that the snow-removal contractor should

be entitled to avail itself of the defenses commonly associated with, and asserted by, premises owners and possessors. Why should only the burden be "loaned" but not the benefits?

The notion that one who has contractually assumed snow-removal responsibilities that would otherwise rest squarely on the landowner's or possessor's shoulders *could not*, like the landowner or possessor, rely on the open and obvious danger doctrine, is incongruous. If that is the law, then snow-removal contractors who earn relatively modest sums for providing snow-removal services to commercial entities will have exponentially greater tort exposure than the commercial landowners and possessors themselves. This would be true notwithstanding the fact that the duty to maintain a safe premises originated with the landowner or possessor, and in the eyes of the law that solemn duty is non-delegable for tort-liability purposes. See M Civ Ji 19.10.

The open and obvious danger doctrine is undoubtedly a powerful tool for defendants in slip-and-fall suits. It would offend notions of fairness if the possessor who derives the most benefit from the use of the premises and its accessibility to invitees would have, by virtue of miserly application of the doctrine, a dramatically lesser exposure to potential tort liability than the snow-removal contractor to whom it delegates a portion of its overall duty. And it simply makes no jurisprudential sense to deprive snow-removal contractors of the open and obvious danger doctrine where their liability arises solely from an allegedly dangerous condition on the premises that caused injury.

The overriding policies recognizing that an invitee confronted with a known or obvious hazard must take appropriate care for his or her own safety, and that warning or protection from a known danger does not make the danger any safer, do not erode simply because the defendant is a snow-removal contractor rather than a property owner or possessor. Snow removal contractors should have the same access to the doctrine that is afforded premises possessors.

This should be true regardless of whether a plaintiff sues for "premises liability" or for liability based upon negligent performance of the snow removal contract.

G. In the present case, the icy conditions in the parking lot were open and obvious, and therefore Creative Maintenance should have been relieved of any duty to plaintiff.

Plaintiff admitted that she saw the allegedly icy conditions in the parking lot as she was leaving the Farmer Jack store.[83] She also noticed the slush freezing, and was warned about ice in the parking lot, earlier in the evening.[84] Therefore, by plaintiff's own admission, this was a known danger.

Because plaintiff admittedly knew of the alleged ice hazard, the lower courts should have recognized that Creative Maintenance owed no duty to warn or protect plaintiff, unless there were "special aspects" of the condition causing it to remain unreasonably dangerous despite the fact that plaintiff knew about it. See *Lugo*, 464 Mich at 517. The critical question is "whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risks from typical open and obvious risks so as to create an unreasonable risk of harm." *Id.*

The "special aspects" that can justify imposing a legal duty despite a condition's openness and obviousness are broken down into two categories: (1) cases where the open and obvious condition "is effectively unavoidable" (such as a customer observing obvious standing water in a store, but being forced to walk through the water because there is only a single exit), and (2) cases in which the open and obvious condition is unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm (such as an unguarded 30-

[83] Apx 86a, S. Fultz, p 12.
[84] Apx 85a, 98a, S. Fultz, pp 10, 35.

foot-deep pit in the middle of a parking lot that can be readily discovered, but which presents a substantial risk of death or severe injury). *Id* at 518.

The risk of slipping on a patch of ice in a parking lot is akin to the risk of tripping on a pothole, as in *Lugo.* The risk of an ordinary, parking-lot slip-and-fall does not create an unreasonably high risk of severe harm, and therefore could not justify departing from the general no-duty rule.

Likewise, the allegedly icy parking lot was not "effectively unavoidable" in this case. Plaintiff did not have to walk into the icy parking lot. She could have re-entered the Farmer Jack store and sought assistance -- plaintiff testified that Farmer Jack "baggers" were available to salt the premises, and that there was salt by the front door.[85] Plaintiff could have declined to walk on the ice and waited until the alleged ice build-up was addressed by Farmer Jack personnel themselves, or through a call to Creative Maintenance. Although plaintiff might complain that seeking or awaiting assistance was an inconvenience, plaintiff is also alleging that the ice created an unreasonably dangerous condition that jeopardized her well-being, and a request for assistance cannot be seen as a significant burden.

Plaintiff also could have taken other measures to avoid the risk herself. Plaintiff could have copied her coworker, who simply left her groceries in a cart on the sidewalk, and then negotiated a safe path to her car before pulling her car up for loading.[86] Furthermore, there was a salted and covered sidewalk abutting the Farmer Jack store. Plaintiff could have used this sidewalk to at least see if a more advantageous path to her car existed before walking into the parking lot.[87]

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[85] Apx 87a, S. Fultz, pp 13-14.
[86] Apx 88a, 98a, 99a, 125a, S. Fultz, pp 15, 35, 37, 89-90.
[87] Apx 125a, S. Fultz, p 90.

Recent Michigan published case precedent reflects that the open and obvious danger doctrine applies to claims based on the build-up of snow or ice.

In *Corey v Davenport College of Business, supra,* summary disposition in favor of the property owners was affirmed. The plaintiff fell on icy steps outside a college dormitory. The panel held that the condition was open and obvious because "plaintiff is a reasonable person who recognized the snowy and icy condition of the steps and the danger the condition presented." *Id* at 5. The same is certainly true of Sandra Fultz. Next, the panel held that "there were no 'special aspects' of the steps that create a 'uniquely high likelihood of harm or severity of harm'." *Id* at 7, quoting *Lugo*. "The steps were not very high, and there was an alternate route available to plaintiff." *Corey* at 9. Again, the same is true of Sandra Fultz. Farmer Jack's parking lot was ice-covered but otherwise unremarkable and other routes and other conduct were available to plaintiff.

In *Joyce v Rubin, supra,* the plaintiff fell on an icy sidewalk as she was leaving her former employer's residence with personal belongings on the snowy day her employer insisted she depart. Given that the plaintiff "saw the snow and recognized that the snow posed a safety hazard," the panel found it established "beyond peradventure" that the danger was open and obvious. *Joyce,* 249 Mich App at 239. The panel rejected that the slippery sidewalk could potentially be considered unreasonably dangerous so that the property owner still had a duty to undertake reasonable precautions to protect. The risk was not "effectively unavoidable" even though the property owner refused to permit entry through a garage or use of a rug to improve traction. Such conduct did not make the condition "so unavoidable that [plaintiff] was effectively forced to encounter the condition." *Id* at 243. She was not "effectively trapped inside a building so that she *must* encounter the open and obvious condition in order to get out." *Id* at 242

The present case is *Joyce* and *Corey* revisited, albeit in a case against a snow removal contractor. The danger was open and obvious, and admittedly so. There was no special aspects that made the risk unreasonably dangerous risk or effectively unavoidable.

In accord and following *Joyce* and *Corey*, see *Feliciano v Sobczak*, Court of Appeals Case No. 243096, released April 10, 2003 (2003 Mich App LEXIS 905), Exhibit I (small ice ridge with snow covering it is an open and obvious danger with no unreasonable risk of severe harm or any special aspects requiring reasonable precautions to protect invitees); *Laurain, supra,* Exhibit E (walkway covered with snow and ice is an open and obvious danger, with no special aspects that make it unreasonably dangerous).

Creative Maintenance asks this Court to rule that open and obvious danger doctrine is available to snow-removal contractors and that, based on the doctrine, Creative Maintenance owed plaintiff no duty. Creative Maintenance's directed verdict or alternatively its motion for JNOV should have been granted. At a minimum, the doctrine's applicability should be recognized and the case should be remanded to the trial court for a new trial, with a properly instructed jury, who will determine whether the alleged ice in the parking lot was "effectively unavoidable."

ARGUMENT IV

Plaintiff left work by crossing a parking lot she knew was iced-over, while carrying four bags of groceries, a gallon of mill and her purse. This was done though there was a salted walkway available and baggers inside the store who plaintiff knew had a supply of salt at the ready. The jury should have been instructed on comparative fault where the plaintiff admitted confronted a known risk and did so encumbered by packages that decreased her ability to deal with that risk.

The Michigan Court Rules require trial courts to read requested model civil jury instructions when those instructions accurately reflect the law and are applicable. Here, the defendants requested the standard (now model) comparative negligence instruction, M Civ Ji

11.01, where plaintiff's testimony revealed that she was warned about icy conditions, saw the ice before she walked on it, but walked on it anyway while carrying four bags of groceries weighing 20-25 pounds, a jug of milk, and a purse. The question of whether plaintiff exercised reasonable care for her own safety was one of fact for the jury to decide, and the trial court's refusal to instruct the jury on comparative negligence constituted reversible error because it deprived Creative Maintenance of the opportunity to present a viable affirmative defense to the jury.

A. Preservation of this issue.

At trial, Creative Maintenance (and its codefendants) asked the trial court to read SJI2d (now M Civ Ji) 11.01 to the jury. The trial court refused, and defendants' objections were noted on the record.[88]

B. Standard of review.

Claims of instructional error are reviewed *de novo*. *Case v Consumer Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). In conducting its *de novo* review, the court examines the jury instructions as a whole to determine whether there was reversible error. *Id.*

C. The trial court's refusal to read the model jury instruction on comparative negligence violated the court rules and resulted in incomplete instructions. This error is reversible because it deprived Creative Maintenance of a viable defense, and a failure to correct it would be inconsistent with substantial justice.

Jury instructions "should include all the elements of the plaintiff's claims and should not omit material issues, material defenses, or theories if the evidence supports them." *Case*, 463 Mich at 6. Although somewhat imperfect instructions do not necessarily create reversible error, this is true only if, "on balance, the theories of the parties and the applicable law are

[88] Apx 233a, 253a, 255a, 257a.

adequately and fairly presented to the jury." *Id.* This Court will reverse for instructional error "where failure to do so would be inconsistent with substantial justice." *Id.*

It has long been the policy of this state that pertinent standard (now denominated as "model") civil jury instructions must be read to the jury. This is reflected in MCR 2.516(D)(2), which requires that the model civil jury instructions "must be given" if they are applicable, they accurately state the law, and they are requested by a party. This Court emphasized the mandatory nature of this rule in a case where it was called upon to interpret MCR 2.516(D)'s predecessor, GCR 1963, 516.6(2):

> This court rule is stated in terms that should leave no doubt concerning the mandatory nature of the SJI. The SJI were compiled in an effort to uniformly present juries in civil cases with clear, concise and unbiased instructions to guide their deliberations. Secondarily, the SJI were also designed to conserve the energies of trial counsel and the trial courts by eliminating the need to draft and select proposed instructions on uncommonly encountered subjects for jury resolution. These enumerated benefits of the SJI are present, of course, only if the SJI are regularly employed by the trial courts. We therefore wish to clearly state that in our view, and under our supervisory powers we hold, that GCR 1963, 516.6(2) *requires* that the SJI be used whenever they are applicable, accurate, and requested by a party.
>
> [*Javis v Ypsilanti Board of Education*, 393 Mich 689, 697 (1975), overruled on other grounds by *Johnson v Corbet*, 423 Mich 304, 325-326 (1985) (emphasis in original).]

This Court later departed from its holding in *Javis* to the extent that *Javis* might be interpreted to create an "automatic reversal" rule based on a failure to read an applicable standard jury instruction, but this Court did not depart from the policy considerations articulated in *Javis*, or its observation in *Javis* that the use of applicable model jury instructions, when requested, is mandatory:

> We continue to believe that the Standard Jury Instructions should be utilized by the bench and bar for the salutary policy reasons

> articulated by the Court in *Javis*. Indeed, MCR 2.516(D)(2) mandates their use.
>
> [*Johnson*, 423 Mich at 325.]

If a trial court's failure to comply with MCR 2.516 "amounts to an 'error or defect' in the trial so that the failure to satisfy the verdict would be 'inconsistent with substantial justice,'" an appellate court should vacate the jury verdict. See *id.*

This Court's precedent is intolerant of rulings depriving civil defendants of a jury instruction on comparative negligence where the evidence would allow reasonable jurors to conclude that the plaintiff may be, in some part, at fault. For instance, in *Hickey v Zezulka*, 439 Mich 408; 487 NW2d 106 (1992), *amended by* 440 Mich 1203 (1992), a majority of this Court held that the trial court committed reversible error by failing to read the model jury instruction on comparative fault in a jail suicide case, even though the plaintiff-inmate's intentional act of suicide did not fall neatly within any traditional concept of "negligence." See *id* at 447-450. That is consistent with the Court's observations in the seminal decision in which it first adopted the doctrine of pure comparative negligence, *Placek v Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979), where the court observed that pure comparative negligence "hold[s] a person fully responsible for his or her acts and to the full extent to which they cause injury." *Placek*, 405 Mich at 661. This Court declared, "That is justice." *Id*

In *Bosak v Hutchinson*, 422 Mich 712; 375 NW2d 333 (1985), the Court rejected a plaintiff's argument that the evidence did not support instructing the jury on comparative negligence where the plaintiff was merely an apprentice, and claimed that he was ordered by his foreman to grab a "gantry" line near the sheave on a crane, which resulted in his loss of some fingers. *Id* at 740-741. The Court remarked that "plaintiff is chargeable with the duty to guard his own safety," and therefore "it was clear that it was proper to instruct the jury on the issue of plaintiff's comparative negligence." *Id* at 740-741.

Michigan Court of Appeals precedent is also instructive, and reflects that in determining whether a comparative negligence instruction should be given, the evidence, and permissible inferences to be drawn from the evidence, should be viewed most favorably to the defendant requesting the instruction:

> When deciding whether an instruction on comparative negligence is appropriate, the question is whether, in viewing the evidence most favorably to the defendant, there is sufficient evidence for the jury to find negligence on the part of the injured plaintiff. . . . Circumstantial evidence and permissible inferences therefrom may constitute sufficient proof of negligence. . . . The trend is to allow all issues, when supported by facts, to go to the jury.
>
> [*Pontiac School Dist v Miller-Canfield-Paddock & Stone*, 221 Mich App 602, 623; 563 NW2d 693 (1997) appeal gtd 457 Mich 871; 586 NW2d 918 (1998) appeal dismissed 459 Mich 988; 613 NW2d 173 (1999) (quoting *Duke v American Olean Tile Co*, 155 Mich App 555, 565-566; 400 NW2d 677 (1986).]

Given that the comparative negligence issue presents, at the risk of stating the obvious, a question of negligence, any decision to take that quintessential fact question from the jury should be viewed as a distinct departure from the normal practices of Michigan courts. "As a general rule, it cannot be doubted that the question of negligence is a question of fact and not of law." *Miller v Miller*, 373 Mich 519, 524; 129 NW2d 885 (1964). "In negligence cases the standard of care is to conform to the legal standard of reasonable conduct in light of the apparent risks." *Maletich v Zemaiduk*, 115 Mich App 206, 209; 320 NW2d 372 (1982). "The necessity of greater or lesser care under given circumstances is a question for the trier of fact." *Id.*

In *Miller, supra,* this Court emphasized that the question of whether a person conformed to the applicable standard of care falls within the special province of the jury, making it inappropriate for the trial court to rule on that question as a matter of law:

> It is because the question of negligence is a question of fact and not of law and because its existence depends upon conformance with or violation of standards of behavior peculiarly within the

> special province of a jury to determine, that the summary judgment procedures of GCR 1963, 117.2(3) [the predecessor to MCR 2.116(C)(10)] rarely will be applicable to a common-law negligence case.
>
> * * *
>
> Unless a judge properly can say that all reasonable men would agree from the undisputed evidentiary facts that there was or was not negligence, the issue must be submitted for jury determination . . . .
>
> [*Miller*, 373 Mich at 524, 525.

Even if the physical facts are not in dispute in a negligence case, the qualitative issue of whether party exercised reasonable care "will be in dispute and must be left for the jury." *Beardsley v RJ Manning Co*, 2 Mich App 172, 175; 139 NW2d 129 (1966).

In the present case, the trial court's refusal to instruct the jury on comparative negligence was nothing short of aberrant. This is a slip-and-fall case in which the plaintiff admitted that she was warned about ice conditions, saw the icy conditions, yet elected to traverse the ice while carrying four bags of groceries, a jug of milk, and a purse. She simply walked a straight line to her car instead of investigated other routes, or the possibility of stepping back to safety and seeking help. Plaintiff saw that one of her coworkers was able to leave the store without falling by walking to her car with free hands, and driving her car back to the store entrance where she could load her groceries without fear of slipping on ice. Plaintiff admitted that there was a sidewalk abutting the Farmer Jack store that had been salted and would have allowed her to approach her car from a different angle or give plaintiff different possible routes to her car. Plaintiff did not return to the Farmer Jack store to request assistance or intervention of any kind, despite "baggers" who often salted and who had an ample supply of salt. Plaintiff made a conscious decision to walk over the ice.

The question of whether plaintiff failed -- in large part or in small part -- to exercise reasonable care for her own safety when she knowingly walked into an icy lot with arms full of

groceries was a classic question of fact for the jury to decide. There was ample evidence supporting defendants' comparative negligence claim, particularly when that evidence, and the reasonable inferences to be drawn from that evidence, were viewed in the light most favorable to the defendants.

The trial court's refusal to read the model civil jury instruction on comparative negligence violated MCR 2.516(D)(2). And this violation of the court rule effectively deprived Creative Maintenance and its codefendants of a substantive defense that may have reduced the judgment amount substantially. "Under comparative negligence, where both the plaintiff and the defendant are culpable of negligence with regard to plaintiff's injury, this reduces the amount of damages the plaintiff may recover . . .". *Lugo, supra* at 523. A failure to reverse this instructional error would be inconsistent with substantial justice. The jury's verdict cannot stand.

RELIEF REQUESTED

Defendant Creative Maintenance Ltd, asks this Court to reverse the judgment against it and, in its stead, order entry of judgment in favor of Creative Maintenance because absent a duty owed, no liability may follow.

Alternatively, the judgment should be vacated and a new trial should be ordered because the jury was not properly instructed.

COLLINS, EINHORN, FARRELL & ULANOFF, P.C.

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EXHIBIT A

LEXSEE 2003 Mich. App. LEXIS 592

DEANNA GOLEMBIEWSKI and MARK GOLEMBIEWSKI, Plaintiffs-Appellants, v THOMAS JARZEMBOWSKI FUNERAL HOME, INC., d/b/a JARZEMBOWSKI FUNERAL HOME, and WOODY'S LANDSCAPING COMPANY, Defendants-Appellees.

No. 238083

COURT OF APPEALS OF MICHIGAN

2003 Mich. App. LEXIS 592

March 11, 2003, Decided

NOTICE:
[*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY:
Wayne Circuit Court. LC No. 00-015020-NO.

DISPOSITION:
Affirmed.

JUDGES:
Before: Kelly, P.J., and White and Hoekstra, JJ.

OPINION:

PER CURIAM.

Plaintiffs appeal as of right the circuit court's orders granting defendants' motions for summary disposition and denying their motion for reconsideration. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On January 13, 1998, plaintiffs drove to defendant Jarzembowski Funeral Home to attend a funeral. Prior to parking in a designated space in the funeral home parking lot Mark Golembiewski stopped in the lot to allow Deanna Golembiewski to exit the vehicle. Deanna Golembiewski opened the vehicle door and stepped down onto the vehicle's running board. She testified at deposition that she did not notice any ice or look down before she stepped off the running board. She slipped on ice and fell to the ground, sustaining injuries.

Plaintiffs filed suit alleging that Deanna Golembiewski was on the premises as a business invitee, and that the funeral home [*2] failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition. Plaintiffs alleged that defendant Woody's Landscaping Company breached its oral contract with the funeral home by failing to take reasonable steps to remove snow and ice from the parking lot. Mark Golembiewski alleged loss of consortium.

Defendants filed separate motions for summary disposition pursuant to MCR 2.116(C)(10), arguing that the undisputed evidence showed that the funeral home parking lot had been plowed, that the condition of the parking lot was open and obvious, and that no special aspects of the condition made it unreasonably dangerous in spite of its open and obvious condition. The trial court granted defendants' motions, finding that no genuine issue of fact existed as to whether the condition of the parking lot was open and obvious, and that no genuine issue of fact existed as to whether any special aspects made the condition unreasonably dangerous in spite of its open and obvious condition. The trial court denied plaintiffs' motion for reconsideration.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell, 249 Mich. App. 468, 479;* [*3] *642 N.W.2d 406 (2001).*

We review a trial court's decision to grant or deny a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson, 240 Mich. App. 223, 233; 611 N.W.2d 333 (2000).* To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant

owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co, 463 Mich. 1, 6; 615 N.W.2d 17 (2000).*

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A possessor of land may be held liable for injuries resulting from negligent maintenance of the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc, 449 Mich. 606, 609-611;* [*4] *537 N.W.2d 185 (1995).*

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id.*, 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand), 198 Mich. App. 470, 474-475; 499 N.W.2d 379 (1993).* However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect invitees from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp, Inc, 464 Mich. 512, 517-519; 629 N.W.2d 384 (2001).*

Plaintiffs argue the circuit court abused its discretion by denying their motion for reconsideration, and erred by granting defendants' motions for summary disposition. We disagree and affirm the trial court's grant of summary disposition. n1 Plaintiffs' motion for reconsideration merely presented the same issues [*5] previously argued to the trial court; thus, the trial court did not abuse its discretion by denying the motion. MCR 2.119(F)(3). Plaintiffs' reliance on *Quinlivan v Great Atlantic & Pacific Tea Co, Inc, 395 Mich. 244, 261; 235 N.W.2d 732 (1975),* for the proposition that the open and obvious danger doctrine does not apply in cases involving an accumulation of snow and ice, is misplaced. *Quinlivan* held that a premises owner owes a business invitee the duty to take reasonable measures within a reasonable period of time after an accumulation of snow and ice to diminish the hazard of injury to the invitee, and rejected the proposition that ice and snow are obvious hazards in all circumstances and cannot give rise to liability. *Id.* Subsequently, this Court has clarified that

> the snow and ice analysis in *Quinlivan* is now subsumed in the newly articulated rule set forth in *Lugo [supra].* Specifically, the analysis in *Quinlivan* will now be part of whether there are special aspects of the condition that make it unreasonably dangerous even if the condition is open and obvious. [*Corey v Davenport College of Business (On Remand), 251 Mich. App. 1, 8;* [*6] *649 N.W.2d 392 (2002).]*

n1 The trial court granted summary disposition in favor of Woody's on the ground that the condition of which plaintiffs complained was open and obvious. Woody's did not own or control the property on which the injury occurred; therefore, application of the open and obvious danger doctrine, an aspect of premises liability, to the issue of whether a genuine issue of fact existed as to whether Woody's performed negligently under its contract was erroneous. A defendant who does not own or control premises on which an injury occurs cannot be held liable under a premises liability theory. See *Derbabian v S & C Snowplowing, Inc, 249 Mich. App. 695, 702; 644 N.W.2d 779 (2002).* As a general rule, those persons or parties foreseeably injured by the negligent performance of a contractual duty are owed a duty of care. *Joyce v Rubin, 249 Mich. App. 231, 243; 642 N.W.2d 360 (2002).* Plaintiffs failed to establish the existence of a genuine issue of fact as to whether Woody's performed negligently under its verbal contract with the funeral home, or whether Deanna Golembiewski was injured as a result of any negligent act by Woody's. We conclude that the trial court correctly granted Woody's motion for summary disposition, albeit for the wrong reason. *Portice v Otsego Co Sheriff's Dep't, 169 Mich. App. 563, 566; 426 N.W.2d 706 (1988).*

[*7]

The funeral home parking lot had been plowed but not salted the day before the accident occurred. In her deposition, Deanna Golembiewski testified that had she been watching where she stepped, she would have noticed the ice and would have attempted to avoid it. The fact that Deanna Golembiewski claimed that she did not see the ice is irrelevant. *Novotney, supra,* 475. It is reasonable to conclude that Deanna Golembiewski would not have been injured had she been watching the area she was about to set foot on. *Millikin v Walton Manor Mobile Home Park, Inc, 234 Mich. App. 490, 497; 595 N.W.2d 152 (1999).* The affidavit from plaintiffs' liability expert did not create an issue of fact in light of Deanna Golembiewski's testimony that had she been watching her step, she would have seen the ice in

the parking lot. Plaintiffs did not come forward with sufficient evidence to create an issue of fact as to whether an average person with ordinary intelligence could not have discovered the condition upon casual inspection. The circuit court did not err in concluding that the condition of the parking lot constituted an open and obvious danger.

Furthermore, plaintiffs' [*8] argument that the condition of the parking lot was unreasonably dangerous under the circumstances is without merit. The attire worn by funeral home patrons and the state of mind of those patrons were not special aspects of the condition of the parking lot itself. Plaintiffs failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious nature. *Lugo*, *supra*; see also *Joyce v Rubin, 249 Mich. App. 231, 240-243; 642 N.W.2d 360 (2002)*. Summary disposition was proper.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Helene N. White

/s/ Joel P. Hoekstra

EXHIBIT B

WYLLIS J. SCHENK AND JOHN SCHENK, Plaintiffs-Appellants, v FIRST OF AMERICA BANK - MICHIGAN NATIONAL ASSOCIATION and SCOTT KITTRIDGE, Individually and d/b/a SCOTTY LEE'S LANDSCAPE & LAWN SERVICE, Defendants-Appellees.

No. 205916

COURT OF APPEALS OF MICHIGAN

1998 Mich. App. LEXIS 709

December 29, 1998, Decided

PRIOR HISTORY:
Oakland Circuit Court. LC No. 96-529838 NO.

DISPOSITION:
Affirmed.

JUDGES:
Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

OPINION:

PER CURIAM.

This is a premises liability action resulting from plaintiff Wyllis Schenk's n1 fall in a parking lot in icy conditions. Plaintiff brought suit against both First of America as the owner of the premises and the contractor engaged by First of America to remove snow and ice from the lot. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs appeal as of right, and we affirm.

n1 John Schenk, Wyllis Schenk's husband, asserted a claim against defendants, alleging that their negligence caused him to lose his wife's society, services, love, affection, companionship, comfort and consortium. For ease of reference, in this opinion the term "plaintiff" will refer exclusively to Wyllis Schenk.

[*2]

When considering an appeal of an order granting summary disposition under MCR 2.116(C)(10), a reviewing court must examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Farm Bureau Mutual Ins Co v Stark, 437 Mich 175, 184-185; 468 NW2d 498 (1991); Shirilla v Detroit, 208 Mich App 434, 437; 528 NW2d 763 (1995).* A defendant's motion for summary judgment should be granted only where the plaintiff's claim is so clearly unenforceable as a matter of law that no factual development could justify allowing the plaintiff to prevail. *Young v Michigan Mutual Ins Co, 139 Mich App 600, 603; 362 NW2d 844 (1984).*

Plaintiff argues that the trial court erred in granting First of America's motion for summary disposition, arguing that a question of material fact exists concerning whether the icy state of the parking lot was an open and obvious condition. Plaintiff further asserts that to whatever extent the ice did constitute an open and obvious condition, that determination [*3] relates only to First of America's duty to warn, leaving First of America nonetheless liable for its failure to keep its premises reasonably safe.

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages." *Lawrenchuk v Riverside*

Arena, Inc, 214 Mich App 431, 432; 542 NW2d 612 (1995). "Duty" is a legally recognized obligation to conform to a particular standard of conduct toward another. *Howe v Detroit Free Press, Inc, 219 Mich App 150, 155; 555 NW2d 738 (1996),* summarily aff'd *457 Mich 870 (1998).* Whether a duty exists is a question of law for the court. *Mason v Royal Dequindre, Inc, 455 Mich 391, 397; 566 NW2d 199 (1997).* Where there is no duty, summary disposition is proper. *Eason v Coggins Memorial Christian Methodist Episcopal Church, 210 Mich App 261, 263; 532 NW2d 882 (1995).*

The extent of a premises owner's duty to others on the land depends on the status of the individual at the time of the injury. *Stanley v Town Square Cooperative, 203 Mich App 143, 146;* [*4] *512 NW2d 51 (1993).* An individual upon another's land may be an invitee, a licensee, or a trespasser. *Id. at 146-147.* A licensee is "'a person who enters on or uses another's premises with the express or implied permission of the owner or person in control thereof.'" *Alvin v Simpson, 195 Mich App 418, 420; 491 NW2d 604 (1992),* quoting *Cox v Hayes, 34 Mich App 527, 532; 192 NW2d 68 (1971).* Where an owner acquiesces in the known, customary use of property by the public, permission may be implied. *Cox, supra.* Plaintiff characterizes her status at the time she was injured as that of licensee. Because plaintiff has not suggested that she had the greater status of invitee, and because defendants have not suggested that plaintiff had the lesser status of trespasser, we will presume that plaintiff was a licensee for purposes of this appeal.

The trial court granted defendant First of America's motion for summary disposition because it was satisfied that plaintiff would be "unable to establish all of the elements necessary for a determination of liability on the part of the landowner. [*5] " We agree.

A landowner is subject to liability for physical harm caused to licensees by a condition on the land if

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved. [*Preston v Sleziak, 383 Mich 442, 453; 175 NW2d 759 (1970),* quoting 2 Restatement of Torts, 2d, § 342, p 210.]

A premises owner is under no duty to warn an adult licensee of an open and obvious danger. See *Bertrand v Alan Ford, Inc, 449 Mich 606, 610-611; 537 NW2d 185 (1995).* Closely related to the open-and-obvious-danger doctrine is the natural-accumulation doctrine: A premises owner has no duty to a licensee to remove a natural accumulation of ice and snow from any location, unless the landowner has taken affirmative actions that caused, or increased the [*6] hazards of, the natural accumulation. See *Hall v Detroit Bd of Education, 186 Mich App 469, 471; 465 NW2d 12 (1990).*

In the instant case, plaintiff testified at her deposition that she was aware of considerable ice on the lot, including in her chosen pathway to the post office, and of her need to be careful of it. Clearly, plaintiff knew of the icy condition of the parking lot and should have realized the risk involved in attempting to walk upon it. The ice on the lot was no hidden danger of which First of America had any duty to warn plaintiff. Further, although plaintiff asserts, and photographs in the record confirm, that there were irregularities in the surface of the lot in question that contributed to the spotty development of patches of ice, plaintiff does not otherwise allege that First of America was in some way responsible for the existence or extent of the hazards of the natural accumulation of ice. Plaintiff cites no authority for the proposition that persons responsible for parking lots must design and maintain them as totally level surfaces in order to take advantage of the natural-accumulation or open-and-obvious defenses. Although severe [*7] irregularities in the surface of a lot may give rise to liability stemming from accumulations specifically resulting from, or aggravated or hidden by, those irregularities, the extent of plaintiff's assertion that the lot in question featured an irregular surface is not sufficient factual support for her claim to avoid dismissal under MCR 2.116(C)(10).

For these reasons, we agree with the trial court that there is no question that First of America had no duty to plaintiff to remove the ice upon which she slipped, or to warn plaintiff of its existence.

Next, plaintiff asserts that the trial court erred by granting defendants Scott Kittridge's and Scotty Lee's Landscape & Lawn Service's motion for summary disposition. We disagree.

The duty that accompanies a service contract is the "common-law duty to perform with ordinary care the things agreed to be done." *Osman v Summer Green Lawn Care, Inc, 209 Mich App 703, 707-708; 532 NW2d 186 (1995).* Individuals foreseeably injured by the negligent performance of a contractual undertaking may charge the contractor with breach of a duty of care. *Id.* at 708.

In this case, because there was no duty on the part [*8] of the premises owner to remove the natural accumulation of ice for plaintiff's benefit, plaintiff cannot maintain an action against the contractor hired by the

premises owner for failing to remove the ice from the premises. Although this Court has recognized that a snow removal contractor may be held liable for injuries to a third party in certain situations, see, e.g., *Osman, supra* (concerning a business invitee), we can find no basis for holding the contractor liable in this case. Although plaintiff asserts that she was injured as a third-party beneficiary of the contract between First of America and Kittridge/Scotty Lee's, the latter maintain that the contract did not call for any service on the day that plaintiff fell, and plaintiff points to no specific provision of the contract that was breached. "When a motion under subrule (C)(10) is made and supported ..., an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Further, there is no dispute that Kittridge/Scotty Lee's [*9] took no action to remove the ice upon which plaintiff slipped, and did not alter the conditions of the parking lot so as to increase the hazards of winter accumulations. The record thus indicates a lack of evidentiary support for plaintiff's claims that Kittridge/Scotty Lee's breached the snow-removal contract, or that Kittridge/Scotty Lee's acted, or failed to act, in a way that constituted negligence.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Peter D. O'Connell

/s/ William C. Whitbeck

EXHIBIT C

LEXSEE 2002 mich app lexis 1298

IRENE CARRINGTON-LEE, MARY FORTENBERRY, ANJENETTA PHIFFER, MATILDA SHANNON, and DIANA HUDSON, Plaintiffs-Appellants, and JUDY NIBLETT, Plaintiff, v DETROIT ENTERTAINMENT, L.L.C., MGM GRAND DETROIT, L.L.C., GREEKTOWN CASINO, L.L.C., and DETROIT TIGERS, INC., Defendants-Appellees.

No. 229760

COURT OF APPEALS OF MICHIGAN

2002 Mich. App. LEXIS 1298

September 17, 2002, Decided

NOTICE:
[*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY:
Wayne Circuit Court. LC No. 99-930611-CZ.

DISPOSITION:
Affirmed.

JUDGES:
Before: Bandstra, P.J., and Smolenski, and Meter, JJ.

OPINION:

PER CURIAM.

Plaintiffs-Appellants ("plaintiffs"), who alleged that defendants harmed them by negligently performing contractual or voluntarily assumed duties and by aiding in a violation of the Civil Rights Act ("CRA"), *MCL 37.2101 et seq.*, appeal as of right from an order granting defendants' motions for summary disposition under MCR 2.116(C)(8).

We affirm.

Plaintiffs argue that the trial court erred in granting summary disposition to defendants because the complaint stated a valid claim for the negligent performance of a contractual or voluntarily assumed duty. This contractual or voluntarily assumed duty related to defendants' entering into a development agreement with the City of Detroit whereby defendants agreed that their contractors would hire a certain number of minority Detroit residents to work on construction projects in Detroit. Plaintiffs, who work [*2] in the construction industry, allege that defendants' actions served to deny them jobs.

We review de novo a trial court's decision to grant summary disposition. *Madejski v Kotmar Ltd, 246 Mich. App. 441, 443; 633 N.W.2d 429 (2001).* Motions brought under MCR 2.116(C)(8) test the legal sufficiency of a claim on the basis of the pleadings alone. *Id. at 443-444.* "All well-pleaded facts are accepted as true and are construed in the light most favorable to the nonmoving party." *Id. at 444.* "Summary disposition under MCR 2.116(C)(8) is proper 'when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery.'" *Corley v Detroit Bd of Ed, 246 Mich. App. 15, 18; 632 N.W.2d 147 (2001),* quoting *Smith v Stolberg, 231 Mich. App. 256, 258; 586 N.W.2d 103 (1998).*

As noted in *Joyce v Rubin, 249 Mich. App. 231, 243; 642 N.W.2d 360 (2002),* persons foreseeably injured by the negligent performance of a contract are owed a duty of care and may sue in tort under certain circumstances. [*3] However, as recently noted by this Court, a third party may not sue in tort for the negligent performance of a contract if the action is based solely on the nonperformance of a contractual duty. n1 *Derbabian v Mariner's Pointe Associates Ltd Partnership, 249 Mich. App. 695, 708; 644 N.W.2d 779 (2002);* see also *Rinaldo's Construction Corp v Michigan Bell Telephone Co, 454 Mich. 65, 83-85; 559 N.W.2d 647 (1997).* In

other words, "the threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's, supra* at 84. Here, the essence of plaintiff's claim was the nonperformance of contractual obligations, and the claim thus was not viable under *Derbabian*. Plaintiffs failed to make any affirmative allegations of misfeasance or active negligence that could support an "independent action in tort against defendant regardless of" a contractual breach. *Derbabian, supra* at 708-709. Accordingly, the trial court correctly granted defendants summary disposition with regard to this issue.

n1 While at first blush, *Commercial Union Ins Co v Medical Protective Co, 426 Mich. 109; 393 N.W.2d 479 (1986),* might suggest otherwise, we note that this plurality opinion rested on the theory of equitable subrogation and is thus distinguishable from the instant case. See *id.* at 126.

[*4]

Plaintiffs also argue that that the trial court erred in granting summary disposition to defendants because the complaint stated a valid claim for aiding in a violation of the CRA. We disagree.

In order for defendants to be liable for aiding in a violation of the CRA, plaintiffs must allege a violation of the CRA to which defendants have rendered aid. In order to allege properly a violation of the CRA, plaintiffs must set forth direct evidence of bias or allege a prima facie case of discrimination. See generally *Hazle v Ford Motor Co, 464 Mich. 456, 462-463; 628 N.W.2d 515 (2001).* Plaintiffs did not set forth any direct evidence of bias and thus must rely on the *McDonnell Douglas* framework for establishing a prima facie case of discrimination. *Hazle, supra* at 462-463; see also *McDonnell Douglas Corp v Green, 411 U.S. 792; 93 S. Ct. 1817; 36 L. Ed. 2d 668 (1973).* In order to establish a prima facie case, plaintiffs must allege the following: (1) plaintiffs belong to a protected class, (2) plaintiffs suffered an adverse employment action, (3) plaintiffs were qualified for the positions in question, [*5] and (4) the positions were given to another person under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing), 458 Mich. 153, 172-173; 579 N.W.2d 906 (1998).*

Plaintiffs alleged that they belong to a protected class, that they suffered an adverse employment action, and that they were qualified for the positions in question. However, upon our de novo review, we conclude that plaintiffs made no allegations that the positions were given to other persons under circumstances giving rise to an inference of unlawful discrimination. Indeed, plaintiffs made no factual allegations relating to these alleged discriminatory acts of the contractors or subcontractors; rather, plaintiffs merely stated that the contractors engaged in discrimination or violated their civil rights. As "the mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action," *ETT Ambulance Service Corp v Rockford Ambulance, Inc, 204 Mich. App. 392, 395; 516 N.W.2d 498 (1994),* plaintiffs have failed to allege a prima facie case of discrimination. Accordingly, [*6] we conclude that plaintiffs have, likewise, failed to state a claim upon which relief may be granted with regard to their claim of aiding in a violation of the CRA.

Affirmed.

/s/ Richard A. Bandstra

/s/ Michael R. Smolenski

/s/ Patrick M. Meter

premises owner for failing to remove the ice from the premises. Although this Court has recognized that a snow removal contractor may be held liable for injuries to a third party in certain situations, see, e.g., *Osman, supra* (concerning a business invitee), we can find no basis for holding the contractor liable in this case. Although plaintiff asserts that she was injured as a third-party beneficiary of the contract between First of America and Kittridge/Scotty Lee's, the latter maintain that the contract did not call for any service on the day that plaintiff fell, and plaintiff points to no specific provision of the contract that was breached. "When a motion under subrule (C)(10) is made and supported ..., an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Further, there is no dispute that Kittridge/Scotty Lee's [*9] took no action to remove the ice upon which plaintiff slipped, and did not alter the conditions of the parking lot so as to increase the hazards of winter accumulations. The record thus indicates a lack of evidentiary support for plaintiff's claims that Kittridge/Scotty Lee's breached the snow-removal contract, or that Kittridge/Scotty Lee's acted, or failed to act, in a way that constituted negligence.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Peter D. O'Connell

/s/ William C. Whitbeck

EXHIBIT D

GARY BENDER and BRIDGETT BENDER, Plaintiffs-Appellants, v JAY SAPH a/k/a NEWPORT SHORES APARTMENTS, JAY SAPH TRUST, ROY G. FRENCH & ASSOCIATES, MARK DANNEELS, BILLY DANNEELS, HAROLD DANNEELS, Individually and d/b/a DANNEELS LANDSCAPING AND SNOW REMOVAL, Defendants-Appellees, and BAUER BUILDERS, Defendant.

No. 237189

COURT OF APPEALS OF MICHIGAN

2003 Mich. App. LEXIS 297

February 11, 2003, Decided

NOTICE:
[*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY:
St. Clair Circuit Court. LC No. 99-002575-NO.

DISPOSITION:
Affirmed.

JUDGES:
Before: Murphy, P.J., and Cavanagh and Neff, JJ.

OPINION:

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' n1 motion for summary disposition under MCR 2.116(C)(10). We affirm.

n1 The case proceeded to hearing on the motions of only defendants Newport and Saph and this appeal concerns only those defendants.

I

This is a premises liability action. Plaintiffs were tenants in an apartment complex owned by defendants. In March 1997, plaintiff, Gary Bender, twice fell on the premises of the apartment complex, once in the parking lot and once near the entrance to the Benders' apartment. Plaintiff claimed that on both occasions he slipped and fell on a thin coating of ice which was covered by a "dusting" of snow.

Defendants' motion for summary disposition focused [*2] on whether ice and snow could have caused Gary Bender's fall in light of weather statistics showing above normal temperatures and little or no precipitation. Defendants presented the affidavit of a forensic meteorologist in support of their claims in this regard. The trial court, however, relied on lack of notice on the part of defendants. That is, the trial court held that plaintiffs did not have any evidence that defendants knew or should have known of any unreasonably unsafe condition of the premises which would have enabled them to correct the problems; it essentially found that defendants owed plaintiffs no duty with regard to the slippery conditions on which plaintiffs based their cause of action.

We review de novo a trial court's ruling on a motion for summary disposition. *Maiden v Rozwood, 461 Mich. 109, 118; 597 N.W.2d 817 (1999).* When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley, 461 Mich. 73, 76; 597 N.W.2d 517 (1999).* [*3]

II

Discovery was closed and mediation concluded when defendants' motion for summary disposition was

heard and decided on August 27, 2001. n2 Both plaintiffs had been deposed and plaintiff Gary Bender had filed his affidavit in opposition to the motion for summary disposition. It is clear from the deposition transcripts and the affidavit that plaintiffs did not provide any notice to defendants of the specific conditions which they claim caused Gary Bender's falls, i.e., the thin layers of ice covered by light dustings of snow on the two dates in March when Gary Bender fell. However, plaintiffs allege that their testimony and affidavit established that they had complained of slippery conditions existing in the past and that the unsafe conditions existed as a result of lack of proper drainage in the parking lot and near the entrance to their apartment. Plaintiffs claimed that defendants not only had notice of the lack of proper drainage in these areas, but that defendants created the problem by failing to have a drain in the parking lot for runoff of melting snow, and by failing to divert roof runoff into the ground near the entrance to their apartment as was done in another area of [*4] the apartment complex.

n2 The order granting the motion was entered on September 20, 2001.

III

There is no dispute that Gary Bender's legal status was that of an invitee. The defendants-invitors had a legal duty of reasonable care to protect their invitee from unreasonable risk of harm caused by a dangerous condition of their premises which they knew or should have known the invitee would not discover, realize or protect himself against. *Bertrand v Alan Ford, Inc, 449 Mich. 606, 616-618; 537 N.W.2d 185 (1995).* n3 However, if the invitee knows of the danger, the invitor owes no duty to protect or warn except in circumstances where harm can be expected in spite of the knowledge of the invitee. *Riddle v McLouth Steel Product Corp,, 440 Mich. 85, 96; 485 N.W.2d 676 (1992).* Questions of duty are for the court to decide as matters of law. *Id* at 95.

n3 This duty does not generally include removal of open and obvious dangers. *Lugo v Ameritech Corp, Inc, 464 Mich. 512, 516; 629 N.W.2d 384 (2001).* While defendants' affirmative defenses included a recitation of the open-and-obvious defense, they did not pursue this line of defense in their motion for summary disposition and the trial court did not mention it in its ruling on the motion.

[*5]

The question of duty in premises liability cases under Michigan law has developed around two sections of the Restatement of Torts, 2d. *Riddle, supra at 93-95; Quinlivan v Great Atlantic & Pacific Tea Co, 395 Mich. 244, 258-261; 235 N.W.2d 732 (1975).*

The first of the two sections is § 343 which states:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

The second is § 343A(1) which provides:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

In *Bertrand,* our [*6] Supreme Court held that where a risk of harm remains unreasonable, despite knowledge of it by the invitee, then a duty may arise on the part of the invitor to take reasonable precautions for the protection of the invitee. *Bertrand, supra at 611-612.* See also *Lugo v Ameritech Corp, Inc., 464 Mich. 512, 516-519; 629 N.W.2d 384 (2001).*

IV

The trial court held that defendants had no duty to act to correct the slippery surfaces on which Gary Bender fell because they had no notice of the allegedly dangerous conditions. We agree with the finding of no duty, but for different reasons than relied on by the trial court.

Plaintiffs allege that prior incidents of ice in the parking lot and near the entrance to their apartment led them to complain to defendants. They also testified that there had been other falls as a result of these conditions. Therefore, it is at least arguable that defendants were on notice of the potential for icy conditions to develop on the premises.

However, plaintiffs' admission that they had knowledge of the danger which they claim caused Gary

Bender to fall, i.e., that ice sometimes formed on the parking lot and near [*7] the entrance to their apartment, affects the nature of defendants' duty. As noted, where an invitee has knowledge of dangerous conditions, an invitor has no duty to protect or warn unless it can be said that harm could be expected in spite of that knowledge. Plaintiffs do not allege and have advanced no proof that in spite of their knowledge that icy conditions sometimes developed, defendants should have expected harm to them. Moreover, plaintiffs have presented no evidence that the conditions of the parking lot and entrance area were unreasonably dangerous for purposes of premises liability.

The trial court was correct in concluding that defendants owed plaintiffs no duty on the facts of this case and in granting summary disposition under MCR 2.116(C)(10). Even though the trial court's reasoning was not based on the proper reasoning, where it reached the right result, we will not reverse. *Phinney v Perlmutter, 222 Mich. App. 513, 532; 564 N.W.2d 532 (1997).*

Affirmed.

/s/ William B. Murphy

/s/ Mark J. Cavangh

/s/ Janet T. Neff

EXHIBIT E

JOHN LAURAIN, Plaintiff-Appellant, v EDWARD W. SPARROW HOSPITAL ASSOCIATION and DENT ENTERPRISES, INC., d/b/a BENJAMIN PARKING LOT MAINTENANCE COMPANY, Defendants-Appellees.

No. 233429

COURT OF APPEALS OF MICHIGAN

2002 Mich. App. LEXIS 1447

October 22, 2002, Decided

NOTICE:
[*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY:
Ingham Circuit Court. LC No. 00-091630-NI.

DISPOSITION:
Affirmed.

JUDGES:
Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

OPINION:

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On March 9, 1998, snow and rain fell during the evening. Defendant Benjamin cleared and salted the parking lots and walkways at defendant Sparrow's facility. The next morning plaintiff, who is a physician, arrived and found the final ten to fifteen feet of the walkway to the physician's entrance to the building covered with ice and snow. He attempted to enter the building through the physician's entrance but slipped and fell to the ground, sustaining injuries.

Plaintiff filed suit alleging that defendants breached their duty to maintain the sidewalk in a safe manner and to warn of any hazards. Sparrow moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it had no duty to warn [*2] plaintiff because the danger was open and obvious. Defendant Dent concurred with the motion. The trial court granted summary disposition in favor of defendants. The court found that reasonable minds could not disagree that the snow and ice was an open and obvious hazard, and that the undisputed evidence showed that plaintiff recognized the hazard and chose to attempt to traverse the walkway to the physician's entrance, notwithstanding the fact that he was aware that other entrances were available.

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp, 225 Mich. App. 601, 605; 572 N.W.2d 679 (1997).*

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co, 463 Mich. 1, 6; 615 N.W.2d 17 (2000).*

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm [*3] caused by a dangerous condition on the land. A possessor of land may be liable for injuries resulting from negligent maintenance of the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc, 449 Mich. 606, 609, 611; 537 N.W.2d 185 (1995).*

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id.* at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand), 198 Mich. App. 470, 474-475; 499 N.W.2d 379 (1993).* However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect invitees from that risk. If such special aspects are lacking, the open and obvious condition is [*4] not unreasonably dangerous. *Lugo v Ameritech Corp, Inc, 464 Mich. 512, 517-519; 629 N.W.2d 384 (2001).*

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendants. He maintains that the open and obvious danger doctrine does not bar an action for injuries caused by the failure to remove snow and ice, citing *Quinlivan v Great Atlantic & Pacific Tea Co, Inc, 395 Mich. 244, 261; 235 N.W.2d 732 (1975).* We disagree and affirm. Plaintiff's reliance on *Quinlivan, supra,* for the proposition that the open and obvious danger doctrine does not apply in cases involving an accumulation of snow and ice is misplaced. That case rejected the proposition that ice and snow are obvious hazards in all circumstances and cannot give rise to liability, but did not hold that the open and obvious danger doctrine is always inapplicable in cases involving snow and ice. *Id.* The *Quinlivan* analysis is now more properly seen as part of the issue of whether there are special aspects of the condition that make it unreasonably dangerous in spite of its open and obvious condition. *Corey v Davenport College of Business (On Remand), 251 Mich. App. 1, 6-9;* [*5] *649 N.W.2d 392.*

In the instant case, it was undisputed that the snow and ice on the walkway was open and obvious, and that plaintiff observed the condition before he attempted to traverse the walkway. Furthermore, plaintiff acknowledged that he attempted to use the walkway to the physician's entrance notwithstanding the fact that he knew that other entrances to the building were available. Plaintiff failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious condition. *Lugo, supra;* see also *Joyce v Rubin, 249 Mich. App. 231, 240-242; 642 N.W.2d 360 (2002).* Summary disposition was proper. *Corey, supra.*

Affirmed.

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra

EXHIBIT F

LEXSEE 2000 Mich. App. LEXIS 2099

ANNE RUTH STUBBLEFIELD, Plaintiff-Appellant, v EIGHT THOUSAND SIX HUNDRED ASSOCIATES LIMITED PARTNERSHIP, d/b/a BEL-AIR CENTER, MCDONALD'S CORPORATION, d/b/a DELAWARE MCDONALD'S CORPORATION, and COMMUNITY THEATRES, INC., Defendants-Appellees, and DATTA CORPORATION and ALL SEASONS MAINTENANCE, Defendants.

No. 208622

COURT OF APPEALS OF MICHIGAN

2000 Mich. App. LEXIS 2099

March 7, 2000, Decided

NOTICE:
[*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY:
Wayne Circuit Court. LC No. 95-529636-NO.

DISPOSITION:
Affirmed.

JUDGES:
Before: Jansen, P.J., and Collins and J. B. Sullivan *, JJ.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

OPINION:

PER CURIAM.

Plaintiff appeals as of right from the trial court's order of dismissal in this premises liability action. Plaintiff challenges the trial court's order requiring her to provide security for costs pursuant to MCR 2.109, as well as its ultimate dismissal of plaintiff's case on the basis that she failed to furnish the ordered bond. We affirm.

Plaintiff alleged that she was injured when she fell while crossing over a mound of snow that divided the sidewalk from the parking lot of defendant Bel-Air Center. The case was mediated and evaluated at $ 6,500 in plaintiff's favor. Plaintiff rejected and defendants accepted the award. The trial court subsequently granted partial summary disposition to defendants. The court found that the danger posed by the snowbank was open and obvious, but that there remained a genuine [*2] issue of material fact with regard to whether the snow bank posed an unreasonable risk of harm. Defendant All Seasons Maintenance (All Seasons) filed a motion for security for costs, arguing, among other things, that the case was frivolous because the snowbank over which plaintiff allegedly fell was open and obvious. Plaintiff opposed the motion and argued that the open and obvious defense was inapplicable because plaintiff had no other way to access the parking lot than by scaling the snowbank which All Seasons created. The court concluded that security for costs was warranted and ordered plaintiff to post a bond in the amount of $ 6,500 on or before August 27, 1997. On October 13, 1997, defendants filed a motion for dismissal based on plaintiff's failure to comply with the order. On December 8, 1997, the trial court ruled that it would grant defendants' motion for dismissal if plaintiff failed to post the bond in fourteen days. Plaintiff did not file the bond and the case was dismissed.

Plaintiff first argues on appeal that the trial court erred in requiring her to provide a security bond because her claim has merit and because the motion for security was not timely. We review a [*3] trial court's decision to require a security bond for an abuse of discretion. *In re Surety Bond for Costs, 226 Mich App 321, 331; 573 NW2d 300 (1997).* An abuse of discretion occurs when an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the trial court's ruling. *In re*

Condemnation of Private Property for Highway Purposes, 228 Mich App 91, 94; 576 NW2d 719 (1998).

Pursuant to MCR 2.109, a trial court may require a plaintiff to post security for costs:

(A) Motion. On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or, if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion. ...

(B) Exceptions. Subrule (A) does not apply in the following circumstances:

(1) The court may allow a party [*4] to proceed without furnishing security for costs if the party's pleading states a legitimate claim and the party shows by affidavit that he or she is financially unable to furnish a security bond.

Security should not be required unless there is a substantial reason for doing so. *In re Surety Bond, supra.* A substantial reason for requiring security may exist where there is "a tenuous legal theory of liability," or "where there is good reason to believe that a party's allegations, although they cannot be summarily dismissed under MCR 2.116, are nonetheless groundless and unwarranted." *Hall v Harmony Hills Recreation, Inc, 186 Mich App 265, 270; 463 NW2d 254 (1990),* citing *Wells v Fruehauf Corp, 170 Mich App 326, 335; 428 NW2d 1 (1988).* If a party does not file a security bond as ordered, a court properly may dismiss that party's claim. *In re Surety Bond, supra.*

As an initial matter we note that the trial court did not state on the record its reasons for granting All Seasons' motion. We encourage courts to make such a record to facilitate appellate review. See *Belfiori v Allis-Chalmers, Inc, 107 Mich App 595, 601;* [*5] *309 NW2d 682 (1981).* Nevertheless, our review of the record convinces us that the trial court did not abuse its discretion in requiring the security bond. Plaintiff argues that the snowbank presented an unreasonable risk of danger because plaintiff had no other "feasible option" to access the shopping center than to cross over the snowbank. While the open and obvious doctrine may suspend a business invitor's duty of care with respect to dangers known to the invitee or dangers so obvious that the invitee might reasonably be expected to discover them, the business invitor remains liable for harm arising from open and obvious dangers "if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee. ..." *Bertrand v Alan Ford, Inc, 449 Mich 606, 610; 537 NW2d 185 (1995).* Contrary to plaintiff's assertions, however, witnesses Derrow Sanders and William Welsh both testified that safer alternate routes to the parking lot were available to plaintiff, including paths cut through the snowbank to access nearby handicap parking and driveways into the parking lot that were cleared of snow on the day plaintiff [*6] fell. Although the trial court determined that it could only grant partial summary disposition to defendants because there remained an issue of fact with regard to whether the danger presented by the snowbank was unreasonable, given the deposition testimony of Sanders and Welsh, the court could fairly question whether plaintiff's claims were warranted. See *Hall, supra; Wells, supra.* Therefore, we cannot conclude that there was no excuse or justification for the trial court's ruling.

Plaintiff also argues that All Seasons' motion was untimely. Because plaintiff failed to raise this issue in the trial court, it is unpreserved and we decline to address it. *Driver v Hanley (After Remand), 226 Mich App 558, 563-564; 575 NW2d 31 (1997); Bloemsma v Auto Club Insurance Ass'n (After Remand), 190 Mich App 686, 692; 476 NW2d 487 (1991).*

Finally, plaintiff argues that the trial court should have waived the bond requirement because she had a legitimate claim and was financially unable to furnish a bond in the amount required by the court. Again, the waiver of a security bond under MCR 2.109(B)(1) is a matter [*7] addressed to the discretion of the lower court. *Hall, supra at 271.* Although plaintiff contends that the court erred in failing to conduct a hearing to determine whether plaintiff's claim was legitimate, because plaintiff failed to submit an affidavit, as required by MCR 2.109(B)(1), in support of her claim that she was financially unable to furnish a bond, it was unnecessary for the trial court to discuss whether her complaint stated a legitimate claim. See *Wells, supra at 339 n 4.* Given the absence of the required affidavit, we find that the trial court did not abuse its discretion in failing to waive the bond. Because plaintiff failed to furnish the bond as ordered, the trial court properly dismissed her claim. *In re Surety Bond, supra.*

Affirmed.

/s/ Kathleen Jansen

/s/ Jeffrey G. Collins

/s/ Joseph B. Sullivan

EXHIBIT G

LEXSEE 1999 Mich. App. LEXIS 954

DALE ROBERTS, Plaintiff-Appellant, v STEVENS ENTERPRIZE, INC., d/b/a QUALITY LAWN CARE, Defendant-Appellee.

No. 203854

COURT OF APPEALS OF MICHIGAN

1999 Mich. App. LEXIS 954

May 11, 1999, Decided

NOTICE:
[*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY:
Wayne Circuit Court. LC No. 96-606007 NO.

DISPOSITION:
Reversed and remanded for further proceedings consistent with this opinion.

JUDGES:
Before: Sawyer, P.J., and Bandstra and R.B. Burns *, JJ.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

OPINION:

PER CURIAM.

Plaintiff slipped and fell on an ice- and snow-covered parking lot. The parking lot was owned by plaintiff's employer, who had hired defendant to clear the ice and snow and put down salt. Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition on the ground that defendant did not owe plaintiff a duty because the danger was open and obvious. We reverse and remand.

The general rule governing premises liability is that the premises owner has a duty to exercise due care to protect his invitee from dangerous conditions on his land. If, however, the dangers are known to the invitee or are so obvious that he could reasonably be expected to discover them, the invitor owes no duty to the invitee [*2] unless the risk of harm remains unreasonable despite its obviousness or the invitee's knowledge of it. *Bertrand v Alan Ford, Inc, 449 Mich 606, 611; 537 NW2d 185 (1995); Riddle v McLouth Steel Products Corp, 440 Mich 85, 96; 485 NW2d 676 (1992).*

Defendant's duty to plaintiff, if any, arose from defendant's obligations under a contract with plaintiff's employer and plaintiff's alleged status as a third-party beneficiary thereof, *Talucci v Archambault, 20 Mich App 153; 173 NW2d 740 (1969),* not from an invitor-invitee relationship. Whether defendant had such a duty and whether the open and obvious danger rule applies outside the context of an invitor-invitee relationship are issues that neither the parties nor the trial court have addressed and, accordingly, we decline to do so also. *Radtke v Everett, 442 Mich 368, 397-398; 501 NW2d 155 (1993); Herald Co, Inc v Ann Arbor Public Schools, 224 Mich App 266, 278; 568 NW2d 411 (1997).*

Assuming, as both parties have, that defendant was entitled to invoke the open and obvious danger rule to obviate [*3] a breach of duty, we conclude that the rule was improperly applied here. We agree with the trial court that the dangers of the ice- and snow-covered parking lot were open and obvious. However, "cases finding that the risk of harm is unreasonable despite its obviousness or despite the invitee's awareness of the condition ... typically involve hazardous natural conditions such as accumulations of snow and ice or excessive mud. The risk to the invitee in such conditions has been held to be somehow more unavoidable than other conditions, thereby creating an exception to the open and obvious defense." *Bertrand, supra at 625-626* (Weaver, J., concurring in part and dissenting in part). As stated in *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc, 395 Mich 244, 261; 235 NW2d 732 (1975):*

We reject the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability. While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. ... As such duty pertains to ice and snow [*4] accumulations, it will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee.

Considering the prevalence of ice and snow accumulations during Michigan's winters, we have concerns that the open and obvious doctrine provides apparently little defense under circumstances as are found in this case. However, we are compelled to follow the available Supreme Court authority on the question and conclude that summary disposition was inappropriately granted to defendants in this case.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Richard A. Bandstra

/s/ Robert B. Burns

EXHIBIT H

LEXSEE 2003 Mich. App. LEXIS 542

CYNTHIA S. GRATOPP and ROBERT GRATOPP, Plaintiffs-Appellants, and LUMBERMENS MUTUAL CASUALTY COMPANY, Intervening Plaintiff, v TANGER PROPERTIES LTD. PARTNERSHIP and HODGINS ASPHALT PAVING, INC., Defendants-Appellees.

No. 237663

COURT OF APPEALS OF MICHIGAN

2003 Mich. App. LEXIS 542

February 28, 2003, Decided

NOTICE:
[*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY:
Ogemaw Circuit Court LC No. 00-653370-NO.

DISPOSITION:
Affirmed in part, and vacated and remanded in part. We do not retain jurisdiction.

JUDGES:
Before: Kelly, P.J., and White and Hoekstra, JJ.

OPINION:

PER CURIAM.

Plaintiffs appeal as of right the circuit court's orders granting defendants' motions for summary disposition. We affirm in part, and vacate and remand in part. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Cynthia Gratopp was employed at a store in a mall owned by Tanger Properties Limited Partnership. Hodgins Asphalt Paving, Inc., had entered into both a written contract with the mall to remove snow from the parking lot and to shovel and salt sidewalks and a verbal contract to clear snow from around dumpsters within twenty-four hours after plowing parking lots. On January 17, 1999 Cynthia Gratopp made several trips to her store's dumpster to dispose of trash. The mall's tenant handbook provided that trash was to be placed in dumpsters. The dumpster was located behind the mall, and was [*2] positioned on a curb. Plaintiff testified that although there was snow in front of the dumpster, she could walk up to the front of the dumpster and throw garbage in. She testified that at the sides and back of the dumpster the snow came out about a foot or two, was at least ankle deep, and was crusty and iced over. After Cynthia Gratopp disposed of the last load of trash she walked behind the dumpster to close the lid. As she did so she stepped on an accumulation of snow and ice, lost her footing, and fell to the ground, sustaining injuries.

Plaintiffs filed suit alleging that Cynthia Gratopp was on Tanger's property as a business invitee, that Tanger negligently failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition, and that Hodgins breached its contract with Tanger by failing to remove snow and ice from around the dumpster. Robert Gratopp alleged loss of consortium.

Defendants filed separate motions for summary disposition pursuant to MCR 2.116(C)(10). Hodgins argued that the snow behind the dumpster was a natural accumulation and was open and obvious, and that no genuine issue of fact existed as to whether it acted reasonably in performing [*3] its contractual duties. Tanger argued that the snow behind the dumpster was open and obvious, and that no special aspects of the condition made it unreasonably dangerous in spite of its open and obvious condition.

Plaintiffs conceded that the accumulation of snow behind the dumpster was an open and obvious condition, but argued the mall policy that required that dumpster lids be closed was a special aspect that made the condition unreasonably dangerous in spite of its open

and obvious nature. The circuit court disagreed, and concluded that no special aspects existed that made the open and obvious condition unreasonably dangerous.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell, 249 Mich. App. 468, 479; 642 N.W.2d 406 (2001).*

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co, 463 Mich. 1, 6; 615 N.W.2d 17 (2000).* [*4]

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A possessor of land may be held liable for injuries resulting from negligent maintenance of the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc, 449 Mich. 606, 609; 537 N.W.2d 185 (1995).* The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id.*, 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand), 198 Mich. App. 470, 474-475; 499 N.W.2d 379 (1993).* However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions [*5] to protect invitees from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp, 464 Mich. 512, 517-519; 629 N.W.2d 384 (2001).*

Plaintiffs argue the circuit court erred by granting defendants' motions for summary disposition. They concede the snow behind the dumpster was an open and obvious condition, but assert that because the mall required tenants to place trash in dumpsters and to close dumpster lids, Cynthia Gratopp had no alternative other than to approach the dumpster from behind in order to close the lid. Plaintiffs assert that under these circumstances, the mall's policy constituted a special aspect of the condition that rendered the condition unreasonably dangerous in spite of its open and obvious nature. In addition, plaintiffs assert that questions of fact existed as to whether Hodgins negligently performed its contractual duties.

We affirm the circuit court's grant of summary disposition to Tanger, and vacate and remand as to Hodgins.

The Supreme Court held in *Quinlivan v Great Atlantic & Pacific Tea Co, 395 Mich. 244, 261; 235 N.W.2d 732 (1975),* [*6] that a premises owner owes a business invitee the duty to take reasonable measures within a reasonable period of time after an accumulation of snow and ice to diminish the hazard of injury to the invitee, and rejected the proposition that ice and snow are open and obvious hazards in all circumstances and cannot give rise to liability. Subsequently, this Court has clarified that

the snow and ice analysis in *Quinlivan* is now subsumed in the newly articulated rule set forth in *Lugo [supra].* Specifically, the analysis in *Quinlivan* will now be part of whether there are special aspects of the condition that make it unreasonably dangerous even if the condition is open and obvious. [*Corey v Davenport College of Business (On Remand), 251 Mich. App. 1, 8; 649 N.W.2d 392 (2002).]*

Cynthia Gratopp made several trips to the dumpster to dispose of trash, and on each trip approached it from the front without difficulty. She testified that she stepped to the back of the dumpster to attempt to close the lid notwithstanding the presence of snow in that area. Plaintiff presented evidence that the mall manager had requested that [*7] tenants keep their dumpster lids closed. This policy, however, was not a special aspect of the accumulation of snow behind the dumpster itself. Plaintiffs failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious condition. The circuit court correctly granted Tanger's motion for summary disposition. *Lugo, supra; Corey, supra.*

The circuit court granted summary disposition in favor of Hodgins on the ground that the condition of which plaintiffs complained was open and obvious. Hodgins was not the owner of the property on which the injury occurred; therefore, application of the open and obvious danger doctrine, an aspect of premises liability, to the issue of whether a genuine issue of fact existed as to whether Hodgins performed negligently under its contract was erroneous. As a general rule, those persons or parties foreseeably injured by the negligent performance of a contractual duty are owed a duty of care. *Joyce v Rubin, 249 Mich. App. 231, 243; 642 N.W.2d 360 (2002).* The circuit court did not address this aspect of defendant's motion and plaintiffs' claim. [*8] We therefore vacate the grant of summary disposition to

Hodgins and remand for reconsideration of Hodgins' motion.

Affirmed in part, and vacated and remanded in part. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Helene N. White

/s/ Joel P. Hoekstra

EXHIBIT I

JAMES E. FELICIANO, Plaintiff-Appellant, v DENNIS E. SOBCZAK, Defendant-Cross/Plaintiff-Appellee, and THE AUTO SHOPPE, Defendant-Cross-Defendant-Appellee.

No. 243096

COURT OF APPEALS OF MICHIGAN

2003 Mich. App. LEXIS 905

April 10, 2003, Decided

NOTICE:
[*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY:
Marquette Circuit Court. LC No. 01-038752-NO.

DISPOSITION:
Affirmed.

JUDGES:
Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

OPINION:

MEMORANDUM.

Plaintiff appeals as of right from the opinion and order granting the defendants' motions for summary disposition under MCR 2.116(C)(10) in this premises liability action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured when he slipped on ice while making a delivery to defendant, The Auto Shoppe. He brought this action, maintaining that his fall was caused by a small ice ridge that resulted from negligent maintenance, and that the ridge was hidden by fresh snow. The trial court concluded that these were open and obvious dangers and that a reasonable jury could not find that they posed an unreasonable risk of harm to plaintiff.

Plaintiff first argues that the trial court erred in holding that the ridge posed an open and obvious danger. Whether a danger is open and obvious depends on whether it is reasonable to expect that [*2] an average person with ordinary intelligence would have discovered it upon casual inspection. *Novotney v Burger King Corp (On Remand), 198 Mich. App. 470, 474-475; 499 N.W.2d 379 (1993).* Regardless of whether plaintiff knew of the specific ice ridge, he admitted knowing that the snow covered packed ice, and he was aware of the danger of slipping. Moreover, an average person with ordinary intelligence would have appreciated the danger.

Plaintiff next argues that the trial court erred in concluding that there was not an unreasonably high risk of severe harm. Plaintiff urges this Court to look at the ice ridge and the snow covering it as separate conditions. He maintains that the ridge was hidden by the snow and was therefore unreasonably dangerous.

If special aspects of a condition make an open and obvious risk unreasonably dangerous, an invitor must take reasonable precautions to protect invitees from that risk. *Lugo v Ameritech Corp, Inc, 464 Mich. 512, 517-519; 629 N.W.2d 384 (2001).* Special aspects are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided ...." [*3] *Id.* at 519. Neither a common condition nor an avoidable condition is uniquely dangerous. *Corey v Davenport College of Business, 251 Mich. App. 1, 8-9; 649 N.W.2d 392 (2002); Joyce v Rubin, 249 Mich. App. 231, 243; 642 N.W.2d 360 (2002).*

The trial court correctly found that there was nothing uncommon about the snow and ice conditions on this parking lot and sidewalk. They did not give rise to a uniquely high likelihood of severity of harm. Moreover, plaintiff admitted that he could have avoided the harm by going to the entrance at the back of the building.

Affirmed.

/s/ Kathleen Jansen

/s/ Karen M. Fort Hood

/s/ Kirsten Frank Kelly